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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Lead Case No. 12-12080-scc Adv. Proc. No. 13-01390-scc
- - - - -x
In the Matters of:
LIGHTSQUARED, INC., et al.,
Debtors.
- - - - -x
HARBINGER CAPITAL PARTNERS LLC, et al.,
Plaintiffs,
- against -
ERGEN, et al.,
Defendants.
- - - - -x
United States Bankruptcy Court
One Bowling Green
New York, New York
January 9, 2014
10:07 AM
B E F O R E:
HON. SHELLEY C. CHAPMAN
U.S. BANKRUPTCY JUDGE

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2 Confirmation Hearing

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4 Adversary Proceeding: 13-01390-scc HARBINGER CAPITAL PARTNERS
5 LLC, et al. v. ERGEN, et al.

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7 TRIAL

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JOHN WANDER, The Blackstone Group

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LIGHTSQUARED, INC., ET AL.

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1 P R O C E E D I N G S

2 THE COURT: Good morning. Please have a seat.

3 All right. Good morning folks. There is an overflow
4 room. I know everyone would like to be in this room. As I
5 mentioned earlier in the week, if there are members of the
6 press, I would strongly encourage you to use the overflow room
7 so that members of the trial teams can be in this room and be
8 comfortable in this room.

9 I'm not seeing any volunteers.

10 All right. We're going to be at this for a long time.
11 So I'm really going to urge you to try to accommodate each
12 other.

13 I see Ms. Schwartz standing in the background with her
14 coat on. She needs to get a seat.

15 All right, Mr. Sussberg.

16 MR. SUSSBERG: Good morning, Your Honor.

17 THE COURT: Good morning.

18 MR. SUSSBERG: I wanted to make a short statement
19 before the opening statements.

20 THE COURT: Okay.

21 MR. SUSSBERG: And then I know Mr. Stone wants to lay
22 some predicates from a procedural standpoint before --

23 THE COURT: Sure.

24 MR. SUSSBERG: -- the opening statements begin.

25 THE COURT: Okay.

LIGHTSQUARED, INC., ET AL.

11

1 MR. SUSSBERG: And this is very brief, Your Honor.

2 But as previewed at the hearing on Tuesday, we learned
3 yesterday from Mr. Lauria that LBAC provided written notice of
4 termination of the plan support agreement because a milestone
5 had not been satisfied.

6 As expected, on the heels of Tuesday's hearing before
7 Your Honor, the special committee and the debtors spent the
8 last forty-eight hours conversing with most all of the
9 constituents in this room, including the ad hoc group of LP
10 lenders and MAST.

11 As we stand here today, Your Honor literally in the
12 throes of analyzing a multitude of possibilities and solutions,
13 what became most clear to the special committee that was
14 important, and I think Your Honor referenced this as well on
15 Tuesday, was that moving forward in the adversary proceeding is
16 of critical importance in these cases, and we agree with that.
17 And through the adversary proceeding, Your Honor, a
18 demonstration by the debtors of inequitable conduct by DISH and
19 SPSO could yield remedies that result in solutions.

20 And just briefly, Your Honor, inequitable conduct
21 could lead to the fashioning of a remedy that results in a
22 turnover of profits to the debtors' estates of any profits that
23 would be realized on account of the purchases made by SPSO.
24 Inequitable conduct could lead to the fashioning of an
25 equitable subordination remedy and a differentiation between

LIGHTSQUARED, INC., ET AL.

12

1 SPSO on the one hand and the non-SPSO lenders on the other
2 hand. And this, too, could lead to an overall restructuring
3 solution.

4 Now the debtors' standalone plan as Your Honor is
5 aware, the confirmation of which is scheduled to go forward on
6 January 21st, does not require or contemplate a specific
7 outcome with respect to this adversary or any desired outcome
8 that's contemplated in the adversary proceeding.

9 But that being said, Your Honor, a remedy that's
10 fashioned as part of this adversary proceeding can make that
11 standalone plan much more attractive, especially to currently
12 non-constituents that are not supporting that plan, or
13 constituents that aren't supporting that plan.

14 The special committee Your Honor stands here today
15 before you simply to note --

16 THE COURT: Did you mean what you just said the first
17 time, did you mean non-constituents as well as constituents?

18 MR. SUSSBERG: It could be all encompassing. Most
19 importantly, it could mean more support from the constituents
20 in this room, but it could be others as well.

21 And, Your Honor, we simply stand here to note that
22 there are various possibilities, all of which are under
23 analysis, as always, an incredibly fluid situation. But we
24 think it's important, as has always been the case, to move
25 forward with this adversary proceeding and potentially unlock

LIGHTSQUARED, INC., ET AL.

13

1 solutions can yield value in an overall maximizing solution.

2 THE COURT: Can I ask one question? And I don't know
3 if you're the right person to answer it. In light of the
4 termination of the plan support agreement, does that affect the
5 adversary in the sense of moving the goal post, if you will?
6 Will I now be hearing as part of the so-called -- or the
7 inequitable conduct, your words, will that include the recent
8 events relating to the termination of the plan support
9 agreement?

10 MR. SUSSBERG: Your Honor, I would turn the podium
11 over to Mr. Lauria to answer that question --

12 THE COURT: Okay.

13 MR. SUSSBERG: -- because I think that's a question
14 for him.

15 THE COURT: Okay. Thank you.

16 MR. LAURIA: Good morning, Your Honor.

17 THE COURT: Good morning.

18 MR. LAURIA: Tom Lauria with White & Case for the ad
19 hoc group of LP secured lenders.

20 I think just to answer the Court's question, we're
21 assessing all of our options at this point. I think it's
22 important for the Court to know that pursuant to the plan
23 support agreement and as reflected in the notice that we
24 received on Tuesday night, the termination of the plan support
25 agreement is not effective until 11:59 on Friday, tomorrow.

LIGHTSQUARED, INC., ET AL.

14

1 THE COURT: Because it's a three-day lead, right?

2 MR. LAURIA: Right, right.

3 So, you know, we're continuing to engage in
4 discussions with LBAC and DISH and we're considering all of our
5 alternatives.

6 We've had -- as Mr. Sussberg referenced, we're in
7 discussions with the companies and its advisors, we're talking
8 to the other stakeholders and we're trying to figure out what
9 the consequences are and what they may mean for the trial on
10 the adversary.

11 You may find the ad hoc group taking an active role or
12 a more active role in connection with this adversary depending
13 on where we come out --

14 THE COURT: Well, that's kind of where I'm going to.

15 MR. LAURIA: Right.

16 THE COURT: Because I don't want to find myself in a
17 situation where you get to that -- the end of that seventy-two
18 hours and then you say you need a do-over in any respect.

19 So we're starting for all purposes --

20 MR. LAURIA: Right.

21 THE COURT: -- with eyes wide open as to that
22 ambiguity that you have in your go-forward position, right?

23 MR. LAURIA: Right. We understand completely.

24 THE COURT: Okay.

25 MR. LAURIA: And, you know, if we're, you know,

LIGHTSQUARED, INC., ET AL.

15

1 jumping in at some point, we understand we're jumping in and
2 we're not going for a do-over.

3 THE COURT: Okay. All right. Yes, good morning.

4 MR. GIUFFRA: Your Honor, can I just be heard for a
5 second.

6 THE COURT: Yes, you can, but I neglected to take the
7 role of the folks on the phone. So just hold it for one second
8 and let me do that and then we'll move forward.

9 On the phone this morning we have Mr. Brown from White
10 & Case, Mr. Daigle from Capital Research, Mr. Ehmer from Silver
11 Point, Mr. Enos from Young Conaway, Mr. Fraser from Fortress,
12 Ms. Iacob from Debt Wire, Ms. Lee from Milbank, Mr. Sanjana
13 from Reorg Research, Mr. Siegel from Stroock, Mr. Smalley from
14 Seaport, Mr. Wander from Blackstone, Mr. Wilson from Skadden,
15 Mr. Zatz from White & Case.

16 All right. I apologize. Go ahead.

17 MR. GIUFFRA: Yes, Your Honor. Robert Giuffra,
18 Sullivan & Cromwell, for DISH and EchoStar. I just wanted to
19 make three points quickly.

20 THE COURT: Okay.

21 MR. GIUFFRA: LBAC, as best I can tell, is not a party
22 to this adversary proceeding.

23 THE COURT: That's correct.

24 MR. GIUFFRA: And it would in our view be a due
25 process problem to start introducing evidence and taking

LIGHTSQUARED, INC., ET AL.

16

1 evidence in the adversary proceeding where LBAC is not a party
2 for some future claim that I don't believe is pled in the
3 complaint.

4 And second, Your Honor, there are no equitable claims
5 that are being brought against DISH or EchoStar, only that
6 single tortious interference claim.

7 So I just think we need to be careful about -- this
8 case, as Your Honor properly noted at the last hearing, is
9 focused on what's before the Court, not some future speculative
10 claim.

11 THE COURT: Right. Well, I think we all agree.

12 MR. GIUFFRA: Okay, thank you, Your Honor.

13 THE COURT: I simply wanted to articulate what seemed
14 obvious to me was an ambiguity that was facing the ad hoc group
15 in light of where we are with respect to the termination of the
16 LBAC bid, and that's why I said what I said. I quite agree
17 with you.

18 I'm trying the second amended complaint and the
19 complaint and that's it.

20 MR. GIUFFRA: Okay. Thank you very much, Your Honor.

21 THE COURT: Okay. Okay.

22 MR. LAURIA: Right. Thank you, Your Honor. We're in
23 agreement.

24 THE COURT: Okay.

25 MR. LAURIA: There is no dispute on this.

LIGHTSQUARED, INC., ET AL.

17

1 THE COURT: Right.

2 MR. LAURIA: We're going to figure out where we are
3 and if we need to, we'll --

4 THE COURT: You'll let us know in real time. Okay,
5 very good.

6 MR. LAURIA: Right, right. Thanks.

7 THE COURT: Okay, very good.

8 All right. Is there anything else in the nature of
9 housekeeping matters that we should do before we get started?
10 Good morning, Mr. Stone.

11 MR. STONE: Your Honor, good morning. Alan Stone,
12 Milbank, Tweed, Hadley & McCloy here on behalf of the debtors.
13 Your Honor, I rise only to say that we have invoked
14 the Rule and that we believe that that applies to opening
15 statements as well and that recipient witnesses should not be
16 informed or given transcripts of the openings or any
17 examination before they testify.

18 THE COURT: Okay. Okay. All right. Very good.

19 Mr. Barr?

20 MR. BARR: Good morning, Your Honor. Matthew Barr of
21 Milbank, Tweed, Hadley & McCloy on behalf of the LightSquared
22 plaintiff debtors.

23 Your Honor, this lawsuit stems from yet another
24 episode in a pattern that --

25 THE COURT: Are you actually starting now?

LIGHTSQUARED, INC., ET AL.

18

1 MR. BARR: I'm sorry.

2 THE COURT: I thought you were telling me something
3 else in a preliminary nature.

4 Before you actually start --

5 MR. BARR: Yes, Your Honor.

6 THE COURT: -- I need to tell you folks that I need to
7 go to a judge's meeting today for fifteen minutes at 12:30.
8 Ordinarily, I wouldn't impose a fixed time for a break, but I
9 have a mandatory meeting that I have to do.

10 So we can see where we are at 12:30 and that can
11 either become your forty-five-minute or hour-long lunch break,
12 whatever you like, or we can simply make that a true fifteen-
13 minute break and come back and keep going.

14 The rules of engagement are we're at your disposal.
15 I'll keep going without a break for a really long time. So I
16 just ask you to let me know when you want to take a break and
17 just keep an eye on the witnesses once they take the stand.

18 MR. BARR: Great.

19 THE COURT: So now you can actually begin.

20 MR. BARR: Now I can start over.

21 THE COURT: Yes.

22 MR. BARR: Thank you, Your Honor.

23 MR. KURTZ: Your Honor, can I make one clarification?

24 THE COURT: Yes, Mr. Kurtz.

25 MR. KURTZ: Glenn Kurtz from White & Case on behalf of

LIGHTSQUARED, INC., ET AL.

19

1 the ad hoc group. Steve Zell is in the room and I've confirmed
2 with debtors counsel that invoking the rule doesn't apply to
3 experts. If there's an objection from anyone else --

4 THE COURT: All right. Any issue? Anyone have an
5 objection?

6 MR. FRAWLEY: No, Your Honor, thank you.

7 THE COURT: Mr. Mundiya?

8 MR. MUNDIYA: No objection, Your Honor.

9 THE COURT: Okay. All right. Very good. Is he the
10 only one that is coming in under that exception at the moment?

11 MR. STONE: At the moment. Mr. Hootnick may appear
12 from time to time at the trial.

13 THE COURT: And Mr. Derrough as well?

14 MR. STONE: Mr. Derrough is going to be here for his
15 testimony.

16 THE COURT: Okay. All right. Okay. Very good.

17 MR. BARR: Your Honor, before I start, I'm going to do
18 an opening for the LightSquared plaintiffs.

19 THE COURT: Okay.

20 MR. BARR: Mr. Friedman then is going to do an opening
21 for his intervention.

22 THE COURT: Okay.

23 MR. BARR: And then I don't know how many on the other
24 side.

25 THE COURT: Okay. All right. I have read everything

LIGHTSQUARED, INC., ET AL.

20

1 that you've submitted, including the brief that was submitted
2 this morning by SPSO and Mr. Ergen. So don't feel obligated to
3 go through every single point.

4 MR. BARR: Excellent. Thank you, Your Honor.

5 So we're starting again. This lawsuit, Your Honor,
6 stems from yet another episode in a pattern that Mr. Ergen and
7 his controlled entities DISH and EchoStar employ against
8 distressed companies, in particular in Chapter 11 cases, to
9 gain controlling positions in debt and securities for strategic
10 purposes to steer the outcome of those cases.

11 This situation is even more interesting, Your Honor,
12 because those trades were done in the face of contract
13 provisions that restrict those entities from purchasing the
14 debt.

15 Unfortunately, for Mr. Ergen in this case his
16 controlled entities DISH and EchoStar were prohibited from
17 investing in LightSquared's debt and equity securities and
18 capital structure and their subsidiaries and affiliates were
19 restricted as well, because they are direct competitors and the
20 credit agreement and corporate governance wanted to restrict
21 and prevent direct competitors from being involved in the
22 capital structure for obvious reasons.

23 The evidence will show that LightSquared Spectrum is a
24 valuable asset and strategic asset in the hands of DISH and
25 EchoStar, and that Mr. Ergen and others did what they believed

LIGHTSQUARED, INC., ET AL.

21

1 necessary to put themselves in the pole position to gain
2 control of those assets.

3 After inquiring into whether DISH and EchoStar could
4 directly make purchases of the securities and the debt, Mr.
5 Ergen, Mr. Kaiser and others came up with what they believed
6 was a work around the restrictions.

7 Their work around, however, doesn't work and they've
8 harmed these estates.

9 Your Honor should not allow this type of conduct to
10 stand, as other judges in this district haven't allowed it to
11 standby the same parties, at best under similar circumstances.

12 And I say at best under similar circumstances, Your
13 Honor, because this is different because Mr. Ergen and his
14 friends have come up with a scheme to get around restrictions
15 that prevented him from doing exactly what he did.

16 Your Honor, there are some basic undisputed facts that
17 you will hear during the trial.

18 In 2011, Mr. Ergen, who is the executive chairman of
19 both DISH and EchoStar, began looking at the LightSquared debt.
20 At that time he asked Mr. Jason Kaiser, who is the treasurer
21 and vice-president of corporate development at DISH and serves
22 as a similar role at EchoStar, to check to see if DISH could
23 buy the LightSquared debt and securities.

24 Mr. Kaiser checked with Sullivan & Cromwell, DISH's
25 outside counsel, and was told that DISH and EchoStar were not

LIGHTSQUARED, INC., ET AL.

22

1 permitted to buy the debt under the terms of the credit
2 agreement.

3 You will hear then that Mr. Kaiser asked Sullivan &
4 Cromwell whether Mr. Ergen could buy the debt personally.

5 We don't know the answer to that, because Sullivan &
6 Cromwell and the defendants invoked a privilege and we don't
7 know how they answered. But we do know that Mr. Ergen through
8 SPSO started to the buy the debt after that question.

9 The trades were placed by Mr. Kaiser and executed by
10 Sound Point Capital Management.

11 To accomplish these trades, Mr. Ergen set up two
12 special purpose vehicles with a variation of the name Bal
13 Harbor and capitalized each of them with ten dollars.

14 Just as the first trade of LightSquared debt was about
15 to close, Mr. Kaiser realized that the Bal Harbor registration
16 documents and forms listed DISH and EchoStar's corporate
17 headquarters address on it. To protect the identity of the
18 ultimate purchaser and not lead people to DISH and EchoStar's
19 doorstep, Mr. Kaiser quickly with Mr. Ketchum set up two
20 different special purpose vehicles, SP Holdings and SPSO and
21 similarly capitalized each of them with ten dollars.

22 The evidence will show, however, that these new
23 entities failed to insulate DISH and EchoStar from the trades
24 because you can't hide from the ultimate beneficiary of the
25 trades.

LIGHTSQUARED, INC., ET AL.

23

1 Even though the addresses were changed, SPSO was run
2 by DISH/EchoStar executives. It was run out of their offices.
3 They used DISH/EchoStar e-mails, phones, facilities, et cetera,
4 Your Honor.

5 The discovery that was produced by SPSO in this case
6 was searched in and pulled from servers at DISH and EchoStar.

7 The evidence will show that SPSO is really
8 DISH/EchoStar and thus, Your Honor, the scheme established was
9 a failed attempt to get around the credit agreement
10 restrictions.

11 Mr. Ergen set out to purchase a blocking position
12 through SPSO and eventually purchased more than half of the LP
13 debt and tried to purchase a substantial majority of the LP
14 preferred securities.

15 There are three important areas of facts or inferences
16 that are in dispute, Your Honor, whether the purchases of the
17 debt were personal investments, and that's what you hear the
18 defendants try to convince you; whether the purchases of dealt
19 were authorized in any way by DISH; and whether there was an
20 effort to delay the closing of the trades.

21 With respect to whether the trades were personal
22 investments, Your Honor, the evidence will show that leading up
23 to the LP debt trades, DISH was aggressively pursuing Spectrum
24 Holding companies in the hopes of finding a suitable partner
25 for which it to align.

LIGHTSQUARED, INC., ET AL.

24

1 DISH was motivated by a desire to build out a network
2 that it was ill prepared to do on its own.

3 The evidence will show that LightSquared, and in
4 particular its Spectrum, was of great interest to DISH as a
5 strategic partner and from a strategic standpoint.

6 It is well settled and well known in the industry that
7 certain of LightSquared Spectrum could be successfully paired
8 with certain spectrum of DISH and create tremendous value for
9 the DISH EchoStar entities.

10 Mr. Ergen himself recognized these potential synergies
11 in 2011 when he admits to having first analyzed the possibility
12 that buying LightSquared would be a good thing for DISH.

13 Mr. Ergen, having purchased other distressed
14 securities in the past for DISH, was aware that there may be
15 restrictions in credit agreements and other documents
16 preventing competitors from buying in a capital structure.

17 So he asked Mr. Kaiser to find out whether DISH and
18 EchoStar can buy the securities.

19 He didn't ask just once, Your Honor. The evidence
20 will show that he continually asked.

21 And from time to time Mr. Kaiser checked to see if
22 changes -- if things have changed, for example, the filing of
23 the Chapter 11 case, whether that had the restrictions of DISH
24 and EchoStar fall away so that they can directly purchase the
25 securities.

LIGHTSQUARED, INC., ET AL.

25

1 He was told that they were not and they couldn't.

2 So Mr. Ergen responded to Mr. Kaiser, continue to
3 purchase the debt and purchase a controlling position if the
4 company, meaning DISH and EchoStar, can't.

5 Mr. Kaiser fulfilled the orders of Mr. Ergen and
6 continued to buy the securities.

7 The evidence will also show that DISH's resources were
8 used to accomplish the trades.

9 In addition to the time that the executive vice-
10 president and treasurer of DISH and EchoStar used or employed
11 in closing these trades and Mr. Ergen the executive chairman,
12 largest shareholder, voting control member of DISH and
13 EchoStar -- as I mentioned DISH's phones, DISH's e-mails and
14 DISH's facilities were used in connection with each and every
15 trade that was made.

16 And the money that was used for the trades, although,
17 Your Honor, we have been told comes from and the evidence shows
18 comes from Mr. Ergen's family trust account, was managed by the
19 same management firm that manages DISH and EchoStar's cash and
20 investments.

21 The trades were also placed using the same investment
22 advisor Sound Point that DISH has used in the past, at least
23 once when buying distressed assets.

24 The record will also show in a presentation to the
25 DISH and EchoStar board in May of 2013 that Mr. Ergen told the

LIGHTSQUARED, INC., ET AL.

26

1 board that the purchases of the debt in LightSquared compliment
2 the acquisition strategy for the assets of LightSquared and
3 that the purchases of the debt would allow DISH to influence
4 these Chapter 11 cases.

5 Furthermore, the evidence will show a personal
6 congratulations sent to Mr. Ergen by Mr. Ketchum, Mr. Ketchum
7 of Sound Point, who is the party that executed each of the
8 trades on behalf of Mr. Ergen and Mr. Kaiser, congratulating
9 him for purchasing a satellite spectrum company upon the
10 purchase by SPSO of a blocking position in the LP debt.

11 This doesn't sound, Your Honor, like a coupon and a
12 collateral package that Mr. Ergen likes for his personal
13 investment that the defendants are going to want you to
14 believe, Your Honor, but it does speak volumes of the true
15 intended beneficiary of the LightSquared debt purchases, which
16 is DISH, Your Honor, especially in connection with their
17 strategy as Mr. Ergen complimented with his debt purchases of
18 purchasing the assets.

19 With respect to whether the purchase of the debt were
20 authorized by DISH, Your Honor, the evidence will show by the
21 nature of their very positions, Mr. Ergen and Mr. Kaiser had
22 the authority to purchase the debt for DISH. And the evidence
23 will provide that, Your Honor.

24 That Mr. Ergen was asked by board members, including
25 DISH in-house counsel and Tom Cullen, DISH's director of

LIGHTSQUARED, INC., ET AL.

27

1 corporate development, the person at DISH that is responsible
2 for their Spectrum strategy, whether there is any truth to the
3 rumors that Mr. Ergen was buying LightSquared's debt.

4 Mr. Ergen's response was there may be some truth to
5 that.

6 The board's choice to sit idly by as Mr. Ergen
7 finished the job was nothing more than the preverbal wink and a
8 nod, Your Honor.

9 DISH and EchoStar's boards were dominated by inside
10 directors who worked for Mr. Ergen.

11 So the fact that the defendants are telling us that
12 they didn't have the authority under the investment guidelines
13 to purchase more than -- a little more than one hundred million
14 dollars of securities at any time in any distressed entity is a
15 mere formality, since he controlled the outcome of basically
16 any discussion and any decision.

17 DISH also ultimately accepted the benefits of Mr.
18 Ergen's debt purchases. As I mentioned, Mr. Ergen told the
19 board that my debt purchases compliment and are going to help
20 you control LBAC, these Chapter 11 cases, when you make your
21 bid for the company.

22 Well, as we all know, DISH ultimately did make the bid
23 for the company and bought LBAC from Mr. Ergen for a dollar.

24 These facts establish that SPSO is nothing other than
25 DISH's proxy with respect to executing the trades in a global

LIGHTSQUARED, INC., ET AL.

28

1 holistic plan to gain control of these Chapter 11 cases and to
2 take these assets through its bid.

3 The trades were intentionally delayed, Your Honor, and
4 the evidence will show that the hung trades were intentionally
5 delayed.

6 They will try to convince you that it was for economic
7 purposes. The evidence, however, doesn't make that clear at
8 all. We think, and as we've put in our documents, there were
9 other reasons.

10 But irrespective of the motivation, Your Honor, the
11 delay, as Your Honor was here with us at all times, caused
12 significant confusion in these Chapter 11 cases, and we submit
13 caused harm to the debtors in these Chapter 11 cases, and the
14 timing of each of those hung trades and what came from those
15 hung trades is very suspect, Your Honor.

16 Taking all of these in combination establishes, Your
17 Honor, in our view that Mr. Ergen's story is just not credible,
18 that these were personal investments through SPSO.

19 When Mr. Ergen takes the stand, hopefully in the next
20 couple of days, you will hear a very nice polished story that
21 ties everything up in a neat package.

22 I don't believe, Your Honor, I need to remind you to
23 think critically when you hear the testimony, but what I
24 thought made sense is that I would preview a couple of points
25 that you'll hear from Mr. Ergen and explain why the Court

LIGHTSQUARED, INC., ET AL.

29

1 should be skeptical.

2 You will hear testimony that Mr. Ergen spent somewhere
3 around 700 million dollars of his own money without once
4 thinking that LightSquared Spectrum could be a strategic asset
5 for DISH, the entity that he controls.

6 But the following undisputed facts show why that
7 simply cannot be the case.

8 Prior to pursuing LightSquared, DISH had just acquired
9 two other MS S companies. Less than two years before, DISH had
10 itself explored the idea of pairing its Spectrum with
11 LightSquared Spectrum.

12 DISH admittedly needed a partner to build out a
13 network because DISH was ill prepared to do so on its own.

14 Mr. Ergen admitted to the DISH board and the EchoStar
15 board that the debt purchases complimented LBAC's acquisition
16 strategy for the LightSquared assets and would allow them to
17 influence the Chapter 11 cases.

18 In addition, you will hear testimony that Mr. Ergen
19 spent 700 million dollars from his family trust and that while
20 Mr. Ergen admits that that was the largest dollar amount
21 personally invested ever, he claims he never once disclosed it
22 to his wife, who importantly is a DISH board member and very
23 importantly is a trustee of the family trust.

24 Ultimately the evidence will show that the credit
25 agreement closed a door for DISH, that Mr. Ergen, through SPSO,

LIGHTSQUARED, INC., ET AL.

30

1 created a window.

2 Your Honor, the harm to LightSquared as a result of
3 this conduct has been significant.

4 Mr. Ergen first used the improper purchases of the
5 debt in equity securities to confuse and frustrate
6 LightSquared's attempt to negotiate with stakeholders, as the
7 hung trades made it virtually impossible to identify the owner
8 of those securities and the debt.

9 It also made it impossible for those parties to talk
10 to us, because they had a pending sale of their securities and
11 their debt to somebody else.

12 He used that debt position in LBAC's bid to distract
13 others from getting involved in the Chapter 11 cases.

14 And now, on the eve of confirmation you heard, Your
15 Honor, DISH withdrew its bid and terminated the PSA.

16 One can only speculate why they did that at this point
17 in time, Your Honor, whether it's to force the special
18 committee to run to them to try to revitalize that purchase,
19 Your Honor, whether they're trying to buy it at a lower price,
20 or whether as a competitor this was part of their scheme to
21 bring us to the brink when we know we're in a cash poor
22 position to either liquidate or for them to put a competitor
23 out of business, Your Honor.

24 In any event, you will hear things like loan-to-own
25 testimony. Mr. Ergen's loan-to-own mission on behalf of DISH

LIGHTSQUARED, INC., ET AL.

31

1 here has failed for the moment, but the harm to LightSquared
2 has been done.

3 The evidence presented at trial will fully satisfy
4 LightSquared's burden of proof of these proceedings.

5 And I thank you, Your Honor.

6 THE COURT: Thank you, Mr. Barr.

7 Mr. Friedman.

8 MR. FRIEDMAN: Your Honor, thank you. David Friedman
9 for Harbinger Capital Partners.

10 Your Honor, the vast majority of my remarks will be
11 focused on a single issue. It's an issue that I refer to
12 tongue and cheek as ergonomics. Ergonomics being the
13 advancement of a factual theory that is demonstrably
14 overwhelmingly at odds with the evidence.

15 That factual theory, Your Honor, is that Charles Ergen
16 bought this LightSquared debt personally.

17 I'd like to point out -- and I will do my best not to
18 overlap with Mr. Barr and to the extent I do I'll be very brief
19 on those points, I'd like to make ten points that any one of
20 which would refute the notion that Mr. Ergen bought this debt
21 personally and collectively, overwhelmingly rebut that notion.

22 Point one, Your Honor, is what did Mr. Ergen do when
23 he first became interested in LightSquared debt? Did he speak
24 to his personal lawyers? Did he speak to his personal
25 financial advisors? Or did he go to DISH?

LIGHTSQUARED, INC., ET AL.

32

1 The answer, of course, is he went to DISH. He spoke
2 to Mr. Kaiser. He spoke to Sullivan & Cromwell. This is in
3 2011.

4 And as Mr. Kaiser testified, after speaking with
5 Sullivan & Cromwell, he says, "I told him," I told Charlie
6 Ergen, "that the companies couldn't buy it."

7 By the way, this is 2011. This is at a point when
8 EchoStar is the only disqualified company. EchoStar is the
9 only one. And he sought advice from Sullivan & Cromwell. And
10 the only disqualified company relating to Mr. Ergen was
11 EchoStar, not DISH yet. And even on that basis, Sullivan &
12 Cromwell advised Mr. Kaiser who relayed to Mr. Ergen that
13 neither DISH nor EchoStar could buy the debt.

14 Point number two, Your Honor, is Mr. Ergen's own words
15 which indicate the fact that the only reason he would possibly
16 consider buying this debt for his personal account is if and
17 only if DISH could not be a buyer.

18 So on October 4th of 2012, Mr. Ergen instructs Mr.
19 Kaiser, quote, it's on the screen, "if we can't be sure the
20 company can buy them" --

21 THE COURT: I'm sorry. Mr. Friedman, hold on. Am I
22 supposed to be looking at the screen? It was flashing pages
23 and I turned it off to not distract me, but if you want me to
24 be looking, I will turn it back on.

25 MR. FRIEDMAN: Okay. I suppose I'd prefer you to look

LIGHTSQUARED, INC., ET AL.

33

1 at the screen.

2 THE COURT: I didn't know if the gentleman in the back
3 was simply testing it or whether I was supposed to be looking.
4 Hold on. Let me catch up with you.

5 Go ahead.

6 MR. FRIEDMAN: So Mr. Ergen in October of 2012 says to
7 Mr. Kaiser, "Jay, if we can't be sure the company can buy them,
8 then I am interested to increase my position at the seventy-
9 five level at least up to a thirty-three percent ownership
10 level of the class."

11 The point being that Mr. Ergen was, if you will, a
12 default buyer. He would be the guy that would buy it if and
13 only if DISH couldn't.

14 Now, point three, Your Honor, I think addresses sort
15 of the obvious question.

16 One of the ways to test whether Mr. Ergen really
17 bought this for his personal account is to inquire, is this
18 something you do? You know, as a matter of course, do you make
19 personal investments in Spectrum companies? Do you make
20 personal investments at this magnitude?

21 So the first point, Your Honor, is that Mr. Ergen had
22 never recalled making a personal investment above a hundred
23 million dollars before. And he was quite candid in saying --
24 if you could put it up on the screen, he was asked the
25 question, "Is it fair to say that LightSquared is the largest

LIGHTSQUARED, INC., ET AL.

34

1 personal -- in terms of dollars, largest personal investment
2 you've made in any one company other than DISH and EchoStar?"
3 Mr. Ergen qualified, "And the U.S. Government," meaning that he
4 had purchased Treasury bills as well -- "company, right." He
5 said, "Company, yes." It's the largest personal investment he
6 ever made.

7 The second point, Your Honor, is that he spent all his
8 money. He spent all his non-DISH money on these debt
9 purchases.

10 He testified he spent about 800 million dollars buying
11 LightSquared. Then he said, "It's my money, I spent most of my
12 personal money to do it, I mean other than" -- then he says,
13 "Take it back. The vast majority of my money is in DISH. But
14 in terms of my money outside of DISH, I spent most of my
15 money."

16 Then the question is, "Well, are you a personal
17 spectrum buyer? Is this something that you do?" So Mr.
18 Leblanc asked him these questions and he asked him, "Had you
19 ever personally bought distressed debt in a spectrum-owning
20 asset before?"

21 Answer, "I don't think so."

22 "Have you ever bought distressed debt in any company
23 that you would consider a competitor of DISH?"

24 Answer, "I don't think so."

25 "Have you ever invested personally in any company that

LIGHTSQUARED, INC., ET AL.

35

1 you'd consider as a strategic investment for DISH?"

2 Answer, "I don't think so."

3 The next point, Your Honor, is, well, if it's a
4 personal investment -- you know, I can't speak for all husbands
5 and wives out there, but if it's a personal investment you
6 would think there would be some discussion within the marital
7 unit as to, you know, I'm going to -- you know, honey, I'm
8 going to spend all my money on some Spectrum assets, what do
9 you think?

10 He made it very clear. He was asked a question, "I
11 may have asked this already, but indulge me. You never told
12 her -- she may not have asked you, but you never told her that
13 you purchased a debt personally, right?"

14 Answer, "No."

15 Now, Your Honor, this point is even more incredible
16 when you consider what we learned yesterday about the
17 management of Mr. Ergen's funds.

18 So all the money, all the 700 million dollars came
19 from a trust established in Mr. Ergen's daughter's name, a
20 trust, again, in which both he and his wife serve as trustees.

21 So on top of the fact that he took all his money to do
22 something he had never done before from a trust established
23 from his daughter, he never told the other trustee, his wife,
24 that he was even doing this.

25 And this was a trust that was conservatively managed

LIGHTSQUARED, INC., ET AL.

36

1 with A-rated securities, fully diversified, and it was
2 completely depleted to buy this debt.

3 So, Your Honor, I ask you to listen to the evidence
4 and just ask the question, is it remotely credible that Mr.
5 Ergen liquidated several hundred million dollars of
6 conservatively managed A-rated diversified assets in his
7 daughter's trust for which he and his wife serve as trustees to
8 make a "personal investment in the distressed debt of a single
9 corporate issuer that was either on the brink of or already in
10 bankruptcy"?

11 Your Honor, this is simply a stunningly unbelievable
12 position.

13 And the only reason, Your Honor -- what that forces us
14 to conclude is that the only reason that Mr. Ergen ever would
15 have done that, the only reason is that the money was never at
16 risk. The money that he took from his daughter's trust fund
17 was never at risk.

18 Why? Because he controlled DISH and he had the power,
19 the inclination and the means to force DISH to make a bid that
20 would monetize and recycle those funds back to his daughter's
21 trust fund.

22 Point four, Your Honor, when people make personal
23 investments, they, you would think, would speak to their
24 personal advisors.

25 I think like most people, I have a business, my

LIGHTSQUARED, INC., ET AL.

37

1 business has its accountants, my business has its, you know,
2 executive directors, those people. I go home, I have my
3 personal issues, I deal with my personal lawyer, my personal
4 financial advisor, my estate planner. That's how most people
5 run their lives.

6 Mr. Ergen had a family office. He had the capacity to
7 go through his family office. He had personal financial
8 advisors.

9 He turned to Jason Kaiser when he wanted to make this
10 investment and he turned to Steven Ketchum with whom he had no
11 prior relationship. I won't go through the testimony because I
12 think it's just going to take time. It's undisputed.

13 And the next point, which is point five, which is also
14 undisputed, not worthy of taking the time to go through the
15 testimony, is that everything that was done here was done with
16 DISH e-mails, DISH phones, DISH offices.

17 And even though Mr. Ergen is quite strident in saying
18 that Mr. Kaiser was acting for his personal benefit, Mr. Kaiser
19 went out and booked over a billion-plus dollars, negotiated and
20 executed over a billion dollars worth of debt trades, and
21 purportedly in Mr. Ergen's personal capacity, Mr. Ergen didn't
22 pay for it, didn't pay them a thing. A billion dollars worth
23 of debt trades. Mr. Kaiser got no compensation for that. The
24 only compensation Mr. Kaiser ever got was from DISH.

25 Now, the sixth point, Your Honor, I think is a key

LIGHTSQUARED, INC., ET AL.

38

1 one. And this is from the words of Mr. Ketchum, that this
2 investment was a "loan-to-own."

3 Mr. Ketchum explained that SPSO's investment in
4 LightSquared "was a loan-to-own in the sense that most
5 investors believed that given the capital structure of the
6 company, that the term loan B was likely to be exchanged for
7 equity securities or that was my expectation."

8 So this is a loan-to-own. And then, indeed, after the
9 final purchase was booked that got Mr. Ergen up above a billion
10 dollars of LightSquared debt, what does Mr. Ketchum write to
11 Mr. Kaiser? He writes, "You just bought a Spectrum company."

12 This e-mail was from Mr. Ketchum to Mr. Richard, but
13 it relates to an earlier e-mail. The original e-mail was from
14 Mr. Ketchum to Mr. Kaiser, which says, "You just bought a
15 Spectrum company", following which Mr. Ketchum then wrote in a
16 following e-mail, "There may be a bunch of press, since we now
17 control the company and I want to manage it."

18 So we -- Ketchum, Kaiser, they now control
19 LightSquared. They want to manage it.

20 Point seven really is the analog to point six. And I
21 think this is really where it all comes together.

22 Charlie Ergen never wanted to own a Spectrum company.
23 There's no evidence that Charlie Ergen ever owned a Spectrum
24 company, ever wanted to own a Spectrum company. He had just
25 spent all his personal wealth on this debt.

LIGHTSQUARED, INC., ET AL.

39

1 Your Honor knows what it costs to run a Spectrum
2 company. There was no money left. This wasn't for him
3 personally. He had never done it before. He never even bought
4 the securities of a Spectrum company before, let alone owned a
5 Spectrum company.

6 So this loan-to-own, that was the internal
7 characterization of the loan by the Ketchum/Ergen team. This
8 loan-to-own could not have been a loan-to-own for Ergen
9 personally.

10 And in fact, when Ergen was asked at a conference
11 call, a DISH conference call, about the LightSquared Spectrum,
12 he said the LightSquared is "Interesting to DISH because the
13 Spectrum potentially could fit with the existing Spectrum that
14 DISH has in the long term, so putting all that Spectrum
15 together at the same time maintains the ability to use the
16 satellite for voice and data, makes a lot of sense."

17 It makes a lot of sense for DISH to own the Spectrum.
18 It makes absolutely no sense for Charles Ergen to own the
19 Spectrum personally, he doesn't have any other Spectrum assets.
20 He doesn't have any other synergies. He doesn't have the
21 ability to combine any Spectrum from one company to another.
22 The loan-to-own was the loan-to-own for DISH and only DISH.

23 And indeed, what happened? As soon as Mr. Ergen
24 amassed his position of a billion dollars of debt, and this is
25 point eight, what does he do? He goes right to the DISH Board

LIGHTSQUARED, INC., ET AL.

40

1 and he says, folks, we should buy LightSquared.

2 And what's the reason he says we should buy
3 LightSquared? He writes in that PowerPoint -- and I think Your
4 Honor saw the whole PowerPoint in an in camera review, we've
5 only seen the first page, but what does he say about the
6 reasons why DISH should buy LightSquared? He says, "Mr.
7 Ergen's substantial interests in L2 debt and preferred stock
8 compliments any acquisition strategy and could have significant
9 influence in L2's Chapter 11 cases."

10 As Mr. Barr said, it was a unitary whole. It was a
11 joint strategy to purchase this company and the debt was the
12 fulcrum acquisition that levered DISH into the acquisition mode
13 here.

14 And, Your Honor, point nine is Your Honor saw this
15 herself. I mean, this played out largely in the courtroom.
16 What was the sequence of events?

17 First, SPSO made their trades and by March 28th of
18 2013 it contracted for over a billion dollars of debt.

19 June 13, 2013, SPSO joins the ad hoc group.

20 Nine days later, LBAC, which up until that point --
21 remember LBAC had made their unsolicited bid a couple of months
22 earlier and LBAC was identified at that point as an entity
23 controlled or owned by Charles Ergen or one of his affiliated
24 companies. It wasn't even identified as what it was.

25 But right after SPSO joined the ad hoc group, LBAC is

LIGHTSQUARED, INC., ET AL.

41

1 sold by Charles Ergen to DISH for one dollar. That was on July
2 22, 2013.

3 And then the very next day, the ad hoc group signs the
4 plan support agreement with LBAC and SPSO and it has attached
5 to it a draft asset purchase agreement.

6 By the way, I think that the plan support agreement,
7 at least until today, was considered a binding document. Maybe
8 it still is a binding document. The board never approved the
9 plan support agreement. The plan support agreement was a
10 multi-billion dollar transaction that committed LBAC into a
11 significant obligation.

12 There's some notion here that the board -- and I'll
13 get to this in a minute -- that somehow the board has limits,
14 places limits on what Mr. Ergen can do.

15 The plan support agreement was signed without any
16 board approval. Most of the directors read about it in the
17 newspaper.

18 The last point, Your Honor, which is just more of an
19 emphasis on that, is the whole notion --

20 THE COURT: Mr. Friedman, can I stop you for a
21 moment --

22 MR. FRIEDMAN: Yeah.

23 THE COURT: -- and just ask one question before you
24 move along?

25 MR. FRIEDMAN: Sure.

LIGHTSQUARED, INC., ET AL.

42

1 THE COURT: One of your points, I think it might have
2 been point seven or point eight, was this is a unitary hold.

3 MR. FRIEDMAN: Right.

4 THE COURT: This is a unitary hold that the end game
5 was in mind --

6 MR. FRIEDMAN: Right.

7 THE COURT: -- from some earlier point, if not at the
8 very beginning, but as it moved along.

9 MR. FRIEDMAN: Right.

10 THE COURT: So how is that observation or theory
11 affected by the current facts on the ground, which is that the
12 bid has been terminated and Mr. Ergen through SPSO is now
13 sitting with 700 or 800 million dollars of debt in an
14 environment that's uncertain as to how he's going to recover
15 that?

16 MR. FRIEDMAN: Right. So it's a very interesting
17 question and my first answer is I don't know anything --

18 THE COURT: Well, your first answer has to be you
19 don't know.

20 MR. FRIEDMAN: Right.

21 THE COURT: Right.

22 MR. FRIEDMAN: So the answer is I don't know. But
23 here's what I think.

24 What I think is, number one, I would really need to
25 understand the motivations and strategies that Mr. Ergen is

LIGHTSQUARED, INC., ET AL.

43

1 deploying. He terminated -- remember, I'm not a fan of the
2 deal, so I don't want to sit here and be an advocate of it, as
3 you know.

4 THE COURT: No, I understand.

5 MR. FRIEDMAN: But having said that --

6 THE COURT: I'm just trying to understand in a
7 holistic way --

8 MR. FRIEDMAN: Sure.

9 THE COURT: -- the unitary theory, right?

10 MR. FRIEDMAN: Sure.

11 THE COURT: The ergonomics, as you put it.

12 MR. FRIEDMAN: Right. So in the first instance, they
13 terminated a transaction, as I believe Mr. Sussberg said, and I
14 haven't seen the letter, but as it was reported to me, on the
15 basis of failing to meet milestones.

16 Now, Your Honor had heard over the last couple weeks
17 something about technical issues. Personally, I don't think
18 and I believe I know, there aren't any technical issues that
19 would have merited termination. So he is now using milestones.
20 Milestones, these are milestones that have been breached, if
21 you will, or hadn't been met for over a month. So the idea
22 that, you know, the milestone is a trigger for a termination,
23 when you could have terminated on that basis over a month ago,
24 just suggests to me that --

25 THE COURT: Okay. But now you're answering a

LIGHTSQUARED, INC., ET AL.

44

1 different question than the one I asked.

2 MR. FRIEDMAN: There's a lot I don't know is what I'm
3 saying so --

4 THE COURT: Right.

5 MR. FRIEDMAN: The second thing is, I think, the
6 breach of contract action, which is what really this is. I
7 mean, the crux of the case is a breach of contract action,
8 invokes a more basic question which is did SPSO and Ergen
9 violate -- did DISH violate the contract because Ergen and SPSO
10 were the surrogates of DISH, that they were simply acting --
11 going out and doing DISH's work, doing DISH's bidding.

12 I think you measure all of that at the time of the
13 breach. I don't think you measure that at a future date. I
14 think if somebody breaches a contract and then for some reason
15 has a change of heart, for whatever reason, still breached the
16 contract.

17 So that's all I -- I mean, I think that's what I have
18 to sort of -- my thoughts right now.

19 THE COURT: That's fine.

20 MR. FRIEDMAN: Okay. So I guess the last thing I
21 really want to say is -- one last main point after that,
22 but the last thing I want to say is what you're going to hear
23 from DISH in particular is this is a public company, they've
24 got investment guidelines, they've got a board of directors.
25 They don't simply do these types of things without following

LIGHTSQUARED, INC., ET AL.

45

1 the protocols, and hence, because the board did not authorize
2 Charles Ergen to buy this debt on behalf of DISH, if it wasn't
3 authorized, it couldn't have happened.

4 Again, there's all kinds of law to talk about here on
5 that, which is not for now, primarily, you know, Kirschner and
6 mediators and all the cases that say whether the board
7 authorizes you or not, corporations are stuck with the actions
8 of their management. But the premise isn't true. The premise
9 that the board somehow controls Mr. Ergen is exactly wrong;
10 it's exactly the opposite. The board doesn't control Mr.
11 Ergen; Mr. Ergen controls the board.

12 So just by way of -- and we get all of this, by the
13 way, because the problem with that is all the other directors
14 other than Mr. Goodbarn are under the control of Mr. Ergen. So
15 the only person that really is going to give you sort of an
16 honest answer as to how the board functions is the only outside
17 director today at DISH, and his name is Steven Goodbarn.

18 And Mr. Goodbarn was asked in a deposition today, "Is
19 it your view that Charlie is essentially responsible for what
20 DISH does in connection with the LightSquared bankruptcy?" and
21 his answer was "yes".

22 And then, in response to a fact that was revealed that
23 he refused to sit on a special litigation committee, he gave an
24 answer and he came up with a number of reasons and then there
25 was a follow-up question which I think is just -- will shorten

LIGHTSQUARED, INC., ET AL.

46

1 this, which he was asked, "So it was your view that nobody else
2 could act in an independent way of Charlie, correct? It was
3 your view that nobody else could act in an independent way of
4 Charlie, correct?" And he said, "That is correct."

5 And so, Your Honor, you put that all together, and
6 this whole fiction of separateness between Ergen and Sound
7 Point on the one hand and Ergen and DISH on the other hand, it
8 just falls away.

9 Now, Mr. Ergen is going to sit in the witness stand
10 and he is going to stay time and time again this was a personal
11 investment. He is absolutely locked in to that testimony. I
12 can't stop him from saying it. I don't think anybody is good
13 enough at cross-examination to stop him from saying it. He's
14 going to say it time and time and time again. But, Your Honor,
15 it's not a credible position and, frankly, it makes no sense.
16 As I said before, it makes no sense that Charles Ergen was
17 going to buy a Spectrum company personally when the whole
18 thesis of the investment were the synergies between DISH and
19 LightSquared.

20 SPSO, Your Honor, plain and simple, was a parking lot.
21 It was a parking lot for the LightSquared debt to be placed to
22 evade contractual restrictions just long enough to amass the
23 level of debt needed to join the ad hoc committee and lever the
24 DISH acquisition.

25 As I said, Mr. Ergen's personal money, or I should say

LIGHTSQUARED, INC., ET AL.

47

1 rather, his daughter's personal money was never at risk. I
2 don't think he would have raided his daughter's trust fund if
3 he really thought there was any risk to that money, to take it
4 from treasury bills, blue chip stocks, and to put it all -- a
5 diversified portfolio, to put it all in a single investment
6 that he never made before -- not if it was a risk, Your Honor,
7 because he had the power to recycle the funds through the LBAC
8 acquisition.

9 He's still going to say it's personal, Your Honor, but
10 I would suggest, Your Honor, that when you try to ask yourself,
11 you know, how is this someone who could look me in the eye and
12 say this was a personal investment, I would refer Your Honor to
13 what I think is a very telling episode that occurred in 2012
14 when the rumors started in May that Mr. Ergen was behind Sound
15 Point. A number of the directors were curious about it, and
16 they went to Stanton Dodge who is the general counsel of DISH,
17 and they said, can you find out.

18 So Mr. Dodge went over to Mr. Ergen and said, are
19 these stories true that you're buying the debt? And what Mr.
20 Ergen said, I'm quoting, he said, "I communicated that there
21 might be some truth to the story, there might be some truth to
22 the story."

23 Your Honor, this was his own in-house lawyer. This
24 was somebody on his side. This was not when in response to an
25 article from the press, this was not in response to an e-mail

LIGHTSQUARED, INC., ET AL.

48

1 from Falcone, this was not in response to a deposition. This
2 was his own guy. And the most he could say, when he had
3 amassed a billion dollars of debt, was that there might be some
4 truth to the story.

5 And one last point -- if we could just back up a page.

6 One last point, Your Honor, which is that this whole
7 notion of separateness, it's a litigation strategy. And Mr.
8 Goodbarn made that clear.

9 And what was said -- Mr. Goodbarn said, and I'm
10 quoting, "There was potential which became actual litigation on
11 the part of Harbinger against him, and he was. He wanted to be
12 as clean as possible with regard to working with DISH so that
13 he didn't gum up that suit, so to speak."

14 And then what he was asked, well, what do you mean,
15 what's the connection between the Harbinger lawsuit and the
16 special committee, and he said, "because it would say that he
17 was working with -- I think the gist of the suit was that he
18 was working with DISH to get around their restrictions to buy
19 the stock." I mean, obviously he meant the debt. So this was
20 a reason given for not sharing information about his trades
21 with the committee at the time.

22 So when -- Mr. Giuffra will get up and say these were
23 separate people doing separate things. Even if it's true, it
24 was just a litigation strategy to create the illusion of
25 separateness so they could defend this lawsuit by saying Mr.

LIGHTSQUARED, INC., ET AL.

49

1 Ergen is not acting for DISH, not because there was any
2 substance to it. But if he's actually going to sit in the
3 witness stand and say, I didn't talk to this guy at DISH, I
4 didn't talk to that guy at DISH, it's only because he had the
5 litigation in mind and recognized that by doing that it might
6 create bad facts on the ground.

7 Now, let me just make one last and completely
8 unrelated point.

9 The principal of my client, Philip Falcone, did not
10 know, did not know until May 2013 that SPSO was acting for
11 Ergen or DISH, the same day that everybody else knew. The
12 rumors started flying about a year earlier, April or May of
13 2012 that Ergen might be the buyer. And for the first couple
14 of days of May 2012, Phil is e-mailing people trying to smoke
15 out a response as to whether Ergen was the buyer. He said a
16 couple of e-mails say, I know it's Ergen. He sent an e-mail to
17 somebody at DISH saying, I know you bought the bonds. He sent,
18 I think, an e-mail to somebody at Jeffries saying it's Ergen.

19 He didn't know. He didn't have any way to know. He's
20 never spoken to Ergen since any of this started. Never spoken
21 to any of Ergen's guys. He never even spoken to Ketchum,
22 doesn't even know Ketchum, doesn't know anybody who works for
23 Ketchum. He had no ability to learn that it was Ergen.

24 Now, they're going to show you a couple of e-mails in
25 early 2012 where Falcone says, I know it's Ergen, I know it's

LIGHTSQUARED, INC., ET AL.

50

1 Ergen. This is not internal e-mails within the Falcone, you
2 know, sphere but accusing other people of making the accusation
3 or making the statement that Ergen bought the debt. And he
4 absolutely wrote those e-mails and he absolutely said those
5 things.

And he will testify that he didn't know it was Ergen
6 and he was fishing; it was a fishing expedition from the
7 beginning. But what I want to show you -- because I know
8 you're going to see those e-mails, I want to show you some
9 other e-mails, about seven of them, that take you through the
10 history from May of 2012 to May of 2013 that will show you what
11 Mr. Falcone knew.

12 So beginning of May of 2012, May 11th, this is just a
13 few days after he writes the e-mail saying I know it's Ergen,
14 Mr. Falcone writes, from the bottom up, "It's not Charlie." He
15 writes to his consultant "it's not Charlie." The consultant
16 writes back, "Yeah, the question is who, Carlos, Dolan, and
17 who?" Falcone writes, "But it's definitely not Charlie." So
18 the consultant writes back, "Well, it's good that it's not
19 Charlie, but now we need to find out who it is." He writes
20 back, "Cablevision." That's on May 11th, okay.

21 The same day he writes an e-mail to the ad hoc lender
22 group, really just a settlement discussion, but at the bottom
23 he says, "I don't believe it's Ergen." Again, he writes that
24 to other people.

25 Then May 24th he writes an e-mail where he says, "I

LIGHTSQUARED, INC., ET AL.

51

1 understand that it's Carlos Slim, but I do not know that for
2 certain." That's on May 24th. The same day, on May 24th, a
3 blog comes out which says, "It now appears that many of the
4 debt holders, and perhaps even Harbinger LightSquared, seem to
5 have concluded that it is not Charlie Ergen backing Sound
6 Point, but the funding for the purchase of Carl Icahn instead
7 came from yet another billionaire, Carlos Slim of Telmex."

8 You fast forward to October of 2012, Mr. Voight from
9 Jefferies writes to Mr. Falcone, "Don't think it's Ergen, Phil.
10 I am very close to his right-hand guy. I should be shocked if
11 he's lying to me." Falcone writes back, "Ergen." Then he
12 writes back, "I think it's AT&T." Clearly --

13 THE COURT: Actually those e-mails go in the -- you
14 have to read them from the bottom up.

15 MR. FRIEDMAN: All right, I'm sorry. Thank you.

16 "I think it's AT&T." Thank you. He writes, "I think
17 it's AT&T." Then he writes "Ergen." Then Voight says, "I
18 don't think it's Ergen. I'd be shocked if my friend was lying
19 to me."

20 January 8th, 2013, the same guys from Jeffries who
21 said, I'm sure it's not Ergen, my guy would never lie to me,
22 now says it's Ergen. Falcone says, "Romeo thinks it's AT&T."
23 Voight from Jeffries who, again, had said it's definitely not
24 Ergen, says, I bet Ergen. He is scooping all the Spectrum up,
25 you should buy DISH and sats equity in -- I'm not even sure

LIGHTSQUARED, INC., ET AL.

52

1 what that means.

2 But then Falcone writes back -- Falcone writes back,
3 when going back. Falcone writes back, "Our regulatory" -- this
4 is the last thing he said, "Our regulatory guys think it will
5 be tough to do us and ClearWire." So that's Falcone's theory
6 why it's not Ergen because the regulatory guys thought that
7 since Ergen at the time was trying to acquire ClearWire, he
8 wouldn't be able to go after LightSquared.

9 Finally, on May 21st -- to show you how in the dark
10 everybody was on this thing, on May 21st, this is like the day
11 before, the word comes out that it's Ergen. Falcone writes to
12 Matt Barr and Doug Smith and Barry Ridings (ph.) and his
13 consultant, "If I were a betting man, I would say that Sound
14 Point is Slim."

15 So my point, Your Honor, is where there are hunches
16 and predictions and theories and did Falcone think it might
17 have been Ergen for a day or two, and did he send e-mails out
18 that said, you know, I know you sold to Ergen or I know you
19 bought the bonds, hoping to get a response, sure. He is
20 fishing like crazy, as by the way is Mr. Hootnick, Mr. Smith --
21 I mean, there was a concerted effort among everybody at
22 Harbinger and LightSquared to reach all their sources to try to
23 find out what's going on. At the end of the day, from May of
24 2012 to May of 2013, the day before the announcement comes out,
25 Falcone still thought it was Carlos Slim.

LIGHTSQUARED, INC., ET AL.

53

1 So I just bring this up, Your Honor, to point this
2 out -- I don't think, by the way, it matters. I mean, I don't
3 think any of that matters because, even if somebody knew
4 something or had a hunch or whatever, if their argument is that
5 somehow it creates a waiver, you know, it's a much, much higher
6 burden than that to argue that you have a waiver. But I just
7 want to make the point, Your Honor, because it's a credibility
8 issue for us. We've made the point all along that we didn't
9 know. And I wanted Your Honor to know that there's going to be
10 a different side to this story than I think you're about to
11 hear from them.

12 So unless Your Honor has any questions, thank you.

13 THE COURT: All right. Thank you, Mr. Friedman.

14 All right, who would like to go next?

15 MS. STRICKLAND: Good morning.

16 THE COURT: Morning.

17 MS. STRICKLAND: For the record, Rachel Strickland,
18 Willkie Farr & Gallagher, on behalf of Charles Ergen and SPSO.

19 The way that LightSquared and Harbinger have
20 characterized the bankruptcy process in their pleadings has me
21 scratching my head. So I just wanted to spend a few minutes on
22 those disconnects because I think that the case boils down to
23 ten fundamentals.

24 The first thing is that trading happens in bankruptcy.
25 Except for NOL and similar orders, the debtors do not have the

LIGHTSQUARED, INC., ET AL.

54

1 ability to halt or stymie trading, not because they're in
2 Chapter 11, not during exclusivity, not after. That means that
3 new parties can buy, old parties can sell, and if that results
4 in a revolving door that's hard to pin down, so be it. That is
5 one of the lumps the debtor has to deal with and they don't
6 have any rights or entitlements in that regard.

7 Two. Other than disclosure required by Rule 2019,
8 creditors have no obligation to make public disclosure about
9 their holdings. They have no duty to engage in the case. They
10 can hold debt and never file a notice of appearance.

11 Three. When investing significant sums in bank debt
12 or securities of an entity in bankruptcy, it is not unusual for
13 investors to be mindful of voting standards. "Block" is not a
14 dirty word. The protections of 1129(b) are there to protect
15 creditors. If a proposed or potential treatment is not to a
16 creditor's liking, that creditor is much better off if a debtor
17 or another plan proponent has to meet the standards of 1129(b).

18 Four. If there is enough value to pay a senior
19 secured creditor class in full, and junior creditors, or as
20 Harbinger says in this case, even equity or actually in the
21 money, unimpairment is always an option. Then block or no
22 block, the votes in an unimpaired class are irrelevant. Blocks
23 are also of no help in a sale process, and it doesn't establish
24 numerosity.

25 Number five. Chapter 11 cases are unpredictable. An

LIGHTSQUARED, INC., ET AL.

55

1 investor, especially one without access to non-public
2 information, has no idea when a company may or may not choose
3 to file for bankruptcy. That investor does not know who the
4 company is negotiating with or what plans it may file a year or
5 more down the road. Cases take a lot of twists and turns, and
6 while grand master plans hatched years in advance make for good
7 pleadings, they are not based on reality.

8 Six. There is no prohibition ever of making a cash
9 offer to buy a company at any price. While credit bidding is
10 also permitted and codified, a cash offer may be submitted by
11 any person or entity at any time. And in most cases, it's
12 actually welcome.

13 Seven. Rule 2004 is a super helpful tool. On the
14 motion of any party-in-interest, the court may order an
15 examination of any entity. Case law says it can be a fishing
16 expedition. And the rules say it can relate to any matter
17 which affects the administration of a debtor's estate.

18 Harbinger and LightSquared have great lawyers. They
19 know lots of ways to definitively determine information. And
20 in fact, if they believe that their estate is being damaged to
21 the tune of billions of dollars, they have a duty to do that.

22 If someone calls my broker or my lawyer and asks a
23 question about me, I hope both decline to answer the question.
24 The job of brokers and lawyers is not to answer questions posed
25 by bankers who cold call them about their clients unless, of

LIGHTSQUARED, INC., ET AL.

56

1 course, they're compelled by legal process.

2 Calling a broker or a lawyer is not the best way to
3 find out information. Interestingly, however, Mr. Hootnick
4 will testify that nobody ever bothered to try and call Carlos
5 Slim's representatives or Dolan's representatives, or AT&T's
6 representatives. None of them. Ever.

7 Eight. Companies that are worried about billions of
8 dollars in damages don't wait a year and reserve rights. They
9 don't wait a week. They don't ask a party they suspect is
10 inflicting harm when they are going to cause more damage as
11 they sit and watch. They stop it.

12 Nine. Separate legal identities do matter.
13 Substantive consolidation in a bankruptcy context is a
14 difficult thing to achieve. So is piercing the corporate veil.
15 So is proving alter ego. Affiliates have separate identities.
16 Harbinger has a separate identity from LightSquared. Mr.
17 Falcone has a separate identity from both Harbinger and
18 LightSquared.

19 Mr. Falcone's phone calls from Harbinger's offices,
20 whether they are for LightSquared or for his personal life,
21 that can be separated out. Mr. Falcone's e-mails, whether he
22 is e-mailing from his Harbinger.com account or his Gmail
23 account or his LightSquared account, those can be separated.

24 Mr. Falcone has conversations with and does business
25 with Mr. Murgio, with Mr. Abruzzi, and lots of other people who

LIGHTSQUARED, INC., ET AL.

57

1 hold positions and work with LightSquared and with Harbinger.
2 And while I wouldn't infer any of those conversations are
3 necessarily for LightSquared or for Harbinger, I wouldn't even
4 be surprised if, especially over the course of the last year,
5 they didn't discuss all kinds of matters that were personal,
6 that were financial, that were legal. People wear multiple
7 hats and that is okay.

8 Ten. Chairman of companies make personal investments
9 too. That's allowed. Public companies also make investments
10 and do transactions. And that, too, is allowed. And it's
11 governed by rules and laws. Public companies have duties of
12 disclosure, and fiduciaries owe a duty of care and a duty of
13 loyalty.

14 It's not bad that Mr. Ergen checked to see who could
15 buy the debt.

16 THE COURT: Well, let me take you up on that one.

17 So he's the chairman, right?

18 MS. STRICKLAND: Right.

19 THE COURT: And he checks to find out whether EchoStar
20 or DISH can buy the debt, and he gets told no.

21 MS. STRICKLAND: Right.

22 THE COURT: And the question, I think that's been --
23 of course, we haven't had the evidence yet, but it's been
24 stated that he asked the question of Mr. Kiser.

25 MS. STRICKLAND: Yes.

LIGHTSQUARED, INC., ET AL.

58

1 THE COURT: Okay. So he's certainly aware of his
2 fiduciary duties and the doctrines of corporate opportunity and
3 duties of loyalty, et cetera, right?

4 MS. STRICKLAND: Yes.

5 THE COURT: So at that point, am I going to hear that
6 he conducted further inquiries as to whether or not, for
7 example, DISH through an affiliate could have acquired the
8 debt? In other words, am I going to hear that, because of the
9 separate identities, he went the extra mile to figure out, in
10 the first instance, how he, as the executive chairman of DISH,
11 could capture this opportunity for DISH before he went ahead
12 and invested his own personal money?

13 MS. STRICKLAND: What you're going to hear, Your
14 Honor, is that he asked the question. He said, bank debt is
15 something that I know that there are sometimes restrictions in,
16 find out who can buy. Not thinking about it going in one
17 direction or another. But before he left, he said, find out
18 who can buy. And the question was asked and it came back, the
19 companies can't buy, it's appropriate to go do it through a
20 structure.

21 THE COURT: So he -- but he only asked his friend, Mr.
22 Kiser. He didn't ask the general counsel of DISH, for example.

23 MS. STRICKLAND: He asked Mr. Kiser and asked Mr.
24 Kiser to check with a lawyer. And Mr. Kiser did.

25 THE COURT: Thank you.

LIGHTSQUARED, INC., ET AL.

59

1 MS. STRICKLAND: And he did ask again, because he
2 wondered whether or not, when the company filed for bankruptcy,
3 the rules changed. And because he is a fiduciary, you wouldn't
4 just keep doing something and not worry about whether or not it
5 was a corporate opportunity. So it's good that he asked. And
6 had he not asked the question at all, this lawsuit and other
7 lawsuits would be about something else entirely.

8 So it's also not bad that Mr. Ergen offered DISH and
9 EchoStar the opportunity to stand in LBAC's shoes for its cash
10 bid either. It's the proper conduct for a fiduciary when a
11 corporate opportunity is involved. And it's true that Mr.
12 Ergen has not invested in Spectrum before. But one has to ask
13 whether or not that's in part because those things were a
14 corporate opportunities.

15 I mentioned the fundamentals, all of which Your Honor
16 knows, because this case seems to be all about parties guessing
17 at motivations and inferring conduct, to explain why this case
18 has been and continues to be very, very difficult. Mr.
19 Sussberg suggested this morning that a "remedy" might ease
20 their liquidity shortfall. So even though most of these
21 problems existed before SPSO had any investment in LightSquared
22 and certainly before it had any active role in these cases, you
23 can't just punish somebody because you need a fix.

24 Today starts the evidence, and that means we leave the
25 land of innuendo and inference and we get down to facts and

LIGHTSQUARED, INC., ET AL.

60

1 credibility. And we really welcome that, because although this
2 table is very long on innuendo and inference, they're very
3 short on evidence. The facts, as you'll hear them over the
4 course of the next week are as follows:

5 You will hear that Mr. Ergen knows a lot about
6 Spectrum. He has spent his life in this business. And if
7 you're going to make a very, very large personal investment,
8 knowing a lot is a good thing. I think Mr. Falcone made a very
9 similar bet.

10 You will hear that Mr. Ergen is the executive chairman
11 of two public companies, DISH and EchoStar. That translates
12 into a few things. First, that means he's really busy; he
13 works a lot. He works on corporate business in his office; he
14 works on personal business in his office. He also works on
15 corporate business from his home. He conducts company business
16 a lot. When he's doing company business, it involves official
17 channels, approvals, guidelines, and disclosure. Personal
18 business doesn't.

19 You will hear that Mr. Ergen interviewed Jason Kiser
20 when Jason was applying for his first real job out of college.
21 They got along and their relationship grew. They socialize
22 outside the office. Their families get together. Charlie
23 trusts Jason. Charlie trusts Jason enough to discuss his
24 personal and financial matters. Jason is familiar with
25 Charlie's accounts, his real estate. He was the one who helped

LIGHTSQUARED, INC., ET AL.

61

1 him buy his ranch. He knows Charlie's assets managers, his
2 brokers, his lawyers. And when he was asked to help out, he
3 called them.

4 Charlie's assets managers and brokers and lawyers,
5 they know Jason too. They know that he helps Charlie from time
6 to time. And not because Charlie is his boss, but because
7 they've known each other for twenty-seven years and he trusts
8 him. And when you are a business chairman of two public
9 companies, it's a good thing to have people who can help you
10 out and who can do things for you and who -- Mr. Ergen does
11 things for him. They are close.

12 You will hear that Jason works at DISH. That's how
13 Charlie and he met. That isn't, however, the only facet. It's
14 not what defines them as people every moment of every day.
15 Their titles are work are one fact. It's been great for
16 inferences, but given the burdens that the plaintiffs have,
17 they're going to need a lot more than titles.

18 You will hear that Mr. Ergen began investing in
19 LightSquared through an appropriate vehicle before LightSquared
20 ever filed for bankruptcy. He did want to keep SPSO's trades
21 confidential, not because he wanted to interfere with
22 LightSquared, not because he wanted to do anything other than
23 buy debt at the lowest possible price. Market knowledge that
24 Mr. Ergen was investing was very likely to make the price go
25 up. Very few investors publicize their investments, and very

LIGHTSQUARED, INC., ET AL.

62

1 few people go to work and talk to people about what their
2 private investments are. If investing confidentially becomes
3 impermissible, that would be new law. Not only is it not
4 illegal, it's justifiable, it's rationale, and most
5 importantly, it's not antagonistic or adverse to the company.
6 The company has to pay back the same amount no matter what the
7 price is that's paid in the secondary market.

8 You will hear that despite his desire, Mr. Ergen
9 wasn't successful at keeping things confidential. Mr. Falcone
10 did know. So I, too, have a few things for your screen, and
11 what I have is just a smattering.

12 Mr. Falcone wrote about Ergen's investment to
13 LightSquared, to other investors, to his own professionals, to
14 DISH, and to the press. There's a few things to note about
15 this. First, when Mr. Falcone or his counsel tells you they
16 were smoking people out in these e-mails and really just trying
17 to suss out who was really buying it, ask yourself, is he
18 bluffing to his own advisors, is he bluffing to the press?
19 What would that achieve?

20 Here, the plaintiff's case relies in part on the fact
21 that market perception that a so-called competitor was in the
22 capital structure harmed and caused billions of dollars to
23 LightSquared. So does it make sense then that the person
24 talking to Matthew Goldstein at thomsonreuters.com says, we
25 confirmed Icahn? He's fronting for Ergen. And then goes on to

LIGHTSQUARED, INC., ET AL.

63

1 say, don't attribute this to me. That's what they're saying
2 caused billions of dollars of damages, the market perception
3 that a creditor -- a competitor was in their capital structure.

4 I'm sure he was trying to smoke things out when he
5 called the press.

6 It wasn't just Falcone that knew. LightSquared knew
7 it too. And I agree with Mr. Friedman, it doesn't matter
8 whether they knew it for a certainty or just had a strong
9 suspicion. If they were really worried about billions of
10 dollars of damages, they had a foolproof tool at their disposal
11 to find out and deal with it. They didn't. They reserved
12 their rights for a year.

13 You will hear --

14 THE COURT: The foolproof tool being coming and
15 seeking relief in this court?

16 MS. STRICKLAND: Absolutely.

17 You will hear that some of SPSO's trades indeed closed
18 faster than others. What you will not hear is a strategy to
19 interfere with these cases. Some of the smallest and most
20 immaterial trades were among the longest lead times. Others
21 that were large closed much more quickly. As is often the norm
22 for debt trades, there is no norm. No investor needs to
23 catalog and justify every thought and motivation they have ever
24 had at all points in time in order to have their debt repaid.

25 But you will hear that Mr. Ergen wasn't thinking about

LIGHTSQUARED, INC., ET AL.

64

1 buying LightSquared in the fall of 2011. And one of the things
2 to note about the screens and the documents and everything else
3 is to watch the dates. When he began thinking about
4 LightSquared in the fall of 2011, when he first asked that
5 question, who can buy, or in 2012 when SPSO first began to
6 initiate trades, for lots of reasons LightSquared did not make
7 sense for DISH. As an investment, Mr. Ergen thought it was a
8 good investment.

9 But DISH and its board were very busy. They were in
10 the midst of obtaining approvals for two recent transactions,
11 DBSD and TERRASTAR. And although much has been said and will
12 be said about DISH and DBSD, the thing that is most notable
13 about DBSD to me is that DISH made a bid, DISH bought a bunch
14 of debt, DISH made disclosure, and when DISH folks were being
15 questioned about their strategy to buy debt, to propose a plan,
16 to vote down another plan, those folks honestly testified that
17 DISH bought that debt, sometimes above par, with the intent to
18 acquire the company.

19 And whether everyone agrees with the new precedent
20 that DBSD made, that's not important. What's important is that
21 DISH, a big public company, made its moves out in the open. It
22 bought those companies, DBSD and TERRASTAR and Blockbuster, and
23 all of these other acquisitions that are filled in the briefs,
24 it bought them out in the open, bought them out of bankruptcy,
25 because DISH and the DISH Board of Directors thought those were

LIGHTSQUARED, INC., ET AL.

65

1 good acquisitions for DISH's shareholders.

2 You will also hear that when the dust settles on those
3 transactions --

4 THE COURT: Isn't one answer that I'm going to hear or
5 one different interpretation of that is that the reason that
6 those were done out in the open is because they could be done
7 out in the open as opposed to this transaction which was
8 determined at an early point transactional -- I'm using that
9 loosely -- the purchases of the debt were not permitted to be
10 done by DISH and therefore could not be done by DISH out in the
11 open? Isn't that the response to that observation?

12 MS. STRICKLAND: Absolutely it is. And there's two
13 reasons why that response doesn't do a thing.

14 The first is that obtaining a blocking position in
15 senior secured debt doesn't buy you a company. It doesn't give
16 you the pole position. It doesn't give you control. You can
17 be crammed. You can be unimpaired. You can be outbidded at a
18 363 auction. It just doesn't do it.

19 And the second reason why it doesn't matter is
20 because -- just because you say --

21 THE COURT: But let me take it up a notch on that one.

22 The other side is going to tell me in a normal
23 situation, that might be true. But here, all of those
24 different scenarios -- you're at risk when you buy debt, you
25 don't know what's going to happen. But here, the difference

LIGHTSQUARED, INC., ET AL.

66

1 is, they're going to tell me, is that from the get-go Mr. Ergen
2 could control the outcome because he could get DISH to approve
3 a cash bid at a level that would pay him and his fellow debt
4 holders in full, including post-petition interest and however
5 folks wanted to characterize in full.

6 So isn't that the response that they're going to give
7 to your very accurate observation that outcomes are uncertain
8 in Chapter 11?

9 MS. STRICKLAND: They have developed a whole bunch of
10 theories that are along those lines. What they don't have are
11 facts to prove them.

12 And part of what is so interesting about the Nevada
13 backdrop here is there's loads and loads of testimony saying
14 this isn't a super-seeker DISH plot. There are a bunch of
15 folks at DISH that didn't know, were unhappy that they didn't
16 know, don't have information about the prices paid for the
17 debt. Special transaction committees were appointed. Special
18 litigation committees were appointed. Fairness opinions were
19 obtained. The board ramped up and took three months to
20 evaluate whether or not it wanted LBAC as an opportunity
21 between May and July 22nd of this year. It doesn't comport
22 with the facts.

23 So yes, there's a lot of those theories and a lot of
24 those inferences, a lot of those stories, but the evidence just
25 doesn't support it.

LIGHTSQUARED, INC., ET AL.

67

1 DISH, very much after DBSD and after TERRASTAR,
2 absolutely had its sight set on other targets. It just wasn't
3 LightSquared. They had their sights set on a myriad of other
4 companies that would have been much better fits for DISH.

5 You're going to hear about MetroPCS, Sprint,
6 ClearWire, bids that played out publicly, as one would expect
7 of a public company, bids that required all of DISH's
8 bandwidth, all of its board and management bandwidths. As Mr.
9 Falcone's regulatory people noted, you can only go to the FCC
10 for so many transactions, all of DISH's financing capabilities.
11 They very much wanted Sprint and ClearWire. I kept waiting to
12 read a brief saying that that was all a charade, too. It's
13 not. That's what they were doing, and they were doing it, for
14 a long time during this whole period. So you can't have all of
15 those irons in the fire. LightSquared was not on the agenda.
16 Not then.

17 You'll hear why technically LightSquared wasn't a good
18 match for DISH and why Sprint and others were a better fit.
19 And the timeline is going to it be important, because it's not
20 just the fact that they were busy with Sprint and ClearWire,
21 but it's also because the Spectrum assets for a long period of
22 time did not match with what DISH already had.

23 Ultimately, however, a lot of things changed. During
24 the course of 2013, a lot of things changed with respect to
25 DISH's perception of what it could use its own Spectrum for and

LIGHTSQUARED, INC., ET AL.

68

1 thus what it made sense to pair it with. There were changes at
2 the FCC. And then and only then, after Sprint fell apart,
3 after ClearWire fell apart, after MetroPCS, their first choice,
4 second choices, third choices, by far, fell away. Only at that
5 point and only after they got different indications from the
6 FCC than they had ever had before did it even make sense
7 strategically, technically, financially for LightSquared and
8 its uplink to become a more attractive possibility.

9 So the plaintiffs will tell you that the reason why
10 DISH decided to bid when it did is because SPSO had the block.

11 Mr. Ergen decided to bid in May of this year because
12 the world had changed. His view of LightSquared had changed.
13 And LightSquared became interesting to him in a way it
14 previously hadn't been.

15 DISH, on the other hand, in May, they're still focused
16 on Sprint. Far, far, far from executing on the grand master
17 plan conspiracy hatched in 2011, carefully plotted out over
18 years.

19 THE COURT: May of 2012 or 2013?

20 MS. STRICKLAND: May of 2013.

21 We talked about the special transaction committee, the
22 special litigation committee of DISH. This case isn't about
23 Nevada, but that backdrop can't be ignored in the sense that
24 the plaintiffs are asking for a lot of inferences to be drawn
25 that don't make sense in light of that.

LIGHTSQUARED, INC., ET AL.

69

1 You will hear that after Mr. Ergen presented the
2 opportunity to both boards in May of 2013, they did, they
3 waited three months before they decided to go ahead. They got
4 separate independent law firms and financial advisors, they got
5 fairness opinions, and they ultimately decided --

6 THE COURT: Hold on a moment.

7 MR. STONE: Your Honor, I hate to interrupt an
8 opening --

9 THE COURT: Yes, Mr. Stone.

10 MR. STONE: -- but, you know, I appreciate Ms.
11 Strickland's testimony, but the fact is that we were blocked
12 from discovery into -- largely into the Nevada matters. We
13 didn't explore those issues in depositions, so this is really
14 inappropriate.

15 MS. STRICKLAND: I don't think it's really
16 inappropriate when they have the transcripts and it's not true,
17 it's a public -- matter of public record, and they've attached
18 most of the public filings from Nevada, but either way --

19 THE COURT: In any event, you're not testifying,
20 you're just giving an argument, so --

21 MS. STRICKLAND: I am.

22 Companies don't buy other companies because of
23 blocking positions an affiliate has in debt. Blocking
24 positions only get you so far. Companies buy companies, in
25 this case for cash, because they make business sense and

LIGHTSQUARED, INC., ET AL.

70

1 they're good for shareholders. Conspiracy theories aside, Mr.
2 Ergen and Mr. Kiser weren't acting as agents for DISH or
3 EchoStar. When SPSO bought the debt in LightSquared, they were
4 acting for SPSO owned entirely, funded entirely by Mr. Ergen.

5 SPSO isn't a natural person, their newest theory, and
6 setting up a vehicle doesn't subvert or breach a single thing.
7 Mr. Ergen is a natural person. He is a person. He's not a
8 subsidiary. And no rational reading of any contract or
9 dictionary changes that.

10 Charles Ergen has spent a lot of his own money
11 investing in LightSquared. And whether that investment turns
12 out to be a good investment or a bad investment, it's on him.
13 There is no one reimbursing, backstopping, taking any downside
14 risk, not one penny other than Charles Ergen. There's no
15 agreement. There is no failsafe. And he didn't nothing wrong.
16 He deserves to vote. He deserves to receive the exact same
17 recovery, whatever it may be, as the rest of his class. That's
18 fair and that's the law.

19 LightSquared has had a lot of litigation in these
20 cases, which I don't need to tell you, first with the ad hoc
21 lenders. They wanted Mr. Lauria and his clients out of their
22 hair. And at that time Mr. Hootnick was more than happy to
23 take me to lunch. Mr. Smith and Mr. Barr were writing letters
24 and e-mails, tallying up SPSO's holdings, even those that
25 hadn't yet closed.

LIGHTSQUARED, INC., ET AL.

71

1 In fact, Mr. Barr came to Your Honor in June of this
2 year to talk about SPSO's holdings. He wasn't complaining
3 about them. He wasn't trying to enjoin them. He was saying,
4 "these trades will close as a fait accompli, and you should let
5 me count them to invalidate the exclusivity stipulation
6 provisions."

7 At that time, SPSO was openly owned by Mr. Ergen. But
8 it was helpful to them, because at that time they wanted to
9 slay the dragon they were currently fighting. At that time
10 LightSquared was not at all confused about who held what. They
11 had been tracking through ClearPar as they had weekly
12 throughout the cases, who sold, what the amount was, what the
13 date was.

14 Mr. Barr sent me an e-mail detailing each of those
15 trades, the counterparty, the amount, the date, and asked me
16 when is SPSO going to close these -- not don't close them,
17 please don't close them -- when is SPSO going to close these.

18 So SPSO was worried. We also came to the court. We
19 also went to the parties. We were worried about the
20 stipulation which contained lender protections, at least one of
21 which we knew about, which was a provision that was public that
22 said, if the group was large, that that debt that Mr. Ergen
23 held through SPSO couldn't be primed. And then there were
24 other provisions we didn't even know about, because they were
25 redacted. And we came in before we did anything and said, we

LIGHTSQUARED, INC., ET AL.

72

1 don't think this is fair; we think we should be able to know
2 what's in there. And we came into the case late. The
3 stipulation said what it said. We upfront, in front of
4 everyone, said, well, I guess if we have to join the committee
5 solely for the purpose of keeping the protections in place, we
6 will do that.

7 And SPSO did join the committee before its holdings
8 reached a point that it would trigger any lender protections
9 that were important to investors in LightSquared's debt to
10 maintain, even the ones we were not even privy too. We joined.
11 We joined after coming to you. We joined after coming to the
12 company and all of the parties in interest. Our motivations
13 were set out loud in advance. And then, after we joined the
14 committee, everything changed. Then Mr. Hootnick was not
15 interested in having lunch with me anymore. Mr. Hootnick
16 stopped returning my calls.

17 After joining, Mr. Falcone sent an e-mail that you'll
18 see to Mr. Smith, asking Mr. Smith if as CEO he was planning on
19 attacking Ergen and the ad hoc committee. If LightSquared
20 couldn't get a deal done, if LightSquared couldn't get
21 financing, if LightSquared couldn't get the FCC approval it has
22 been waiting and waiting and waiting for, they should look in
23 the mirror or maybe they should call Mr. Falcone.

24 SPSO is not the cause of this company's woes; it just
25 isn't. Invalidating an investment of any size is a big deal.

LIGHTSQUARED, INC., ET AL.

73

1 It's a very heavy consequence and it has to be supported by
2 facts, by lots and lots of facts that prove absolutely
3 egregious conduct. And after sitting around and watching SPSO
4 trade for a year, a job title and an inference isn't going to
5 cut it. And that's all they have.

6 THE COURT: Thank you, Ms. Strickland.

7 Yes, Mr. Giuffra.

8 MR. GIUFFRA: Good morning, Your Honor.

9 THE COURT: Good morning.

10 MR. GIUFFRA: Robert Giuffra, Sullivan & Cromwell.

11 And it's my privilege to represent DISH and EchoStar along with
12 my partners, Brian Frawley and Brian Glueckstein.

13 I have some handouts that I want to just give Your
14 Honor, if I could approach.

15 THE COURT: Sure. Do the other parties have them?

16 MR. GIUFFRA: Yes, I'm giving them out right now.

17 Your Honor, the evidence in this case will show that
18 there's absolutely no basis for the claims against DISH and
19 EchoStar. They are an afterthought.

20 As Your Honor knows, there's just a single legal claim
21 that's been sustained and that's for tortious interference.
22 And in fact, in LightSquared's brief submitted last night, they
23 relegate just three and a half pages of their thirty-five-page
24 brief to this single tortious interference claim.

25 Now, last month, I tried to persuade Your Honor to

LIGHTSQUARED, INC., ET AL.

74

1 dismiss that claim and I was unsuccessful. And I should say we
2 appreciate all the time Your Honor has spent on this case and
3 putting in a long opinion on the first motion to dismiss by
4 Harbinger. But on that motion to dismiss, as on any motion to
5 dismiss, Your Honor had to accept the allegations of the
6 complaint as true. That's the law. You had to draw the
7 reasonable inferences from the facts that were pled in the
8 plaintiff's favor.

9 And now we've had lots of discovery. We've had lots
10 of document discovery, deposition discovery. At trial, the
11 burden is now on LightSquared. They've got no benefit of
12 inferences. The trial is about proof, not speculation, not
13 innuendo, not labels. In fact, it was interesting Mr. Barr
14 actually used the words "one can only speculate about why
15 things happen." Well, speculation is not the stuff of proof.
16 Facts are. And the evidence is going to show here that
17 LightSquared cannot satisfy its burden of proving tortious
18 interference against DISH or EchoStar.

19 THE COURT: Let me ask you a question. There's a
20 difference between speculation and inferences, right?

21 MR. GIUFFRA: Absolutely, Your Honor.

22 THE COURT: Everybody's going to put on their evidence
23 and I'm going to be asked to draw inferences from the evidence,
24 right. So that's not speculation, is it?

25 MR. GIUFFRA: But, for example, Your Honor, they claim

LIGHTSQUARED, INC., ET AL.

75

1 there's damage here from the fact that Mr. Ergen was in the
2 capital structure. We'll demonstrate at this trial there's no
3 evidence to support that. It's pure speculation.

4 THE COURT: All right. I'm asking really a different
5 question, which is that for -- Ms. Strickland told me that I'm
6 going to hear, and I believe we're going to hear from Mr.
7 Ergen, testimony that this was a personal investment --

8 MR. GIUFFRA: Absolutely.

9 THE COURT: -- and the parties have all assured me
10 that he's going to be very certain in that regard and we'll
11 see. My question though, with respect to speculation though,
12 is that the parties also can adduce other facts and evidence
13 and ask me to draw inferences that are contrary to that
14 testimony, right?

15 MR. GIUFFRA: Absolutely, Your Honor, no question, no
16 question.

17 THE COURT: Okay.

18 MR. GIUFFRA: Now, in a tortious interference case,
19 LightSquared has the burden of proving by a preponderance of
20 the evidence five elements. They've got to show a valid
21 contract between the plaintiff and a third party. They've got
22 to show the defendant's knowledge of that contract. They've
23 got to show the defendant's intentional procurement of the
24 third party's breach of that contract without justification.
25 They've got to show the actual breach of the contract,

LIGHTSQUARED, INC., ET AL.

76

1 something we haven't heard much about during the presentations
2 this morning. No one has talked about the credit agreement or
3 the transfer restrictions, which is really what the case
4 ultimately is about. You've got to show damages. You've got
5 to show those five elements to make a claim.

6 Now, when I was here on the Harbinger motion to
7 dismiss in October, I explained that DISH and EchoStar were
8 public companies with boards and thousand was shareholders and
9 that they had to comply with SEC reporting requirements. And
10 discovery has confirmed that those companies have investment
11 policies to ensure board consideration of large investments.
12 In the case of DISH, the investment policy requires that going
13 to the board, if you do a transaction of more than 125 million
14 dollars. In the case of EchoStar, fifty million dollars. And
15 the evidence in this case will show that Mr. Ergen, not DISH or
16 EchoStar, personally bought the debt.

17 It will show that Mr. Ergen continues to own the debt.
18 It will show that Mr. Ergen -- and this is a really important
19 point -- bears one hundred percent of the downside. If the
20 transaction here -- and Your Honor actually hit it on exactly
21 right. You know, things are uncertain right now, how this is
22 all going to turn out, no one knows the extent to which
23 creditors are going to be paid, and discovery has made clear,
24 and they've gotten all the documents that exist in the world,
25 there's no evidence of some secret deal between DISH and

LIGHTSQUARED, INC., ET AL.

77

1 EchoStar and Mr. Ergen to indemnify Mr. Ergen if it turns out
2 that this big investment turns out to not be worth anything.

3 Now, his wife and his daughter may be mad, but he's
4 got no downside protection here. If there was downside
5 protection, that's the kind of thing they would have discovered
6 in the course of discovery. There is no downside protection.
7 The debt was bought with Mr. Ergen's money. He bears the risk.
8 And right now, there's more risk than there was a month ago in
9 connection with that purchase.

10 There's no evidence here of a secret deal that the
11 boards of DISH or EchoStar authorized him to go out and buy
12 this debt. Nothing. That would be the first thing they would
13 have put on of the screen for Your Honor. They haven't done
14 that. It doesn't exist.

15 There's no evidence that the boards of DISH or
16 EchoStar even knew about the purchases by Mr. Ergen of
17 LightSquared debt until May 2013, after he had already acquired
18 the debt.

19 Simply put, there is no evidence as opposed to
20 speculation, innuendo, to support what was Harbinger's original
21 claim that DISH, EchoStar, and Mr. Ergen were all one and the
22 same. Doesn't exist.

23 THE COURT: But that's what I was talking about with
24 the difference between speculation and inference, because the
25 inference that they're going to ask me to draw from this fact

LIGHTSQUARED, INC., ET AL.

78

1 that the board and the special committee did not know about the
2 debt purchases, and there has also been some indications that
3 there were less than crystal-clear answers given to direct
4 questions by, I think, Mr. Cullen and Mr. Dodge on the point.
5 The inference that they're going to ask me to draw is that he
6 didn't need to tell them because he knew the ending of the
7 story. He knew that when he wanted to get the debt repaid, he
8 would simply cause the board to approve a cash bid that would
9 make him whole. That's the inference that they're going to ask
10 me to draw from the fact that the board was not informed of his
11 debt purchases, right?

12 MR. GIUFFRA: That's their inference, Your Honor. But
13 the counter-inference, the counter-facts are whose money was
14 used, and sitting here today, who's bearing all the risk, and
15 the risk is now being borne by Mr. Ergen and his daughter and
16 his wife and their trusts. And there's no secret deal. And
17 there's a public board of directors that, as Ms. Strickland has
18 pointed out, appointed a transaction committee and a special
19 litigation committee, and he's got no protection. You know,
20 it's his investment.

21 And they can speculate about what he could cause them
22 to do or not cause them to do. This is matter that's now in
23 two courthouses in this country, a public company with special
24 litigation committees, special transaction committees, and the
25 facts don't support this speculation that this was somehow a

LIGHTSQUARED, INC., ET AL.

79

1 risk-free deal that Mr. Ergen could engage in, because as I
2 have said, there is no evidence of an indemnity agreement
3 between Mr. Ergen and DISH or EchoStar. So if the debt turns
4 out to be worth nothing, Mr. Ergen has lost all the money he's
5 invested.

6 Now, in this case LightSquared is looking to blame
7 someone for its failure to manage this company out of
8 bankruptcy and the significant FCC challenges that it faces.

9 This litigation is a smokescreen. It's a way to
10 divert attention. There's no evidence of corporate
11 skullduggery here. There's speculation about it, and it's a
12 constantly changing speculation.

13 This case ultimately against DISH and EchoStar rests
14 on a flawed theory of agency. But agency law is not a tool of
15 contract interpretation. There is no basis to expand the
16 definition of disqualified company in the loan agreement based
17 on, you know, agency concepts. You look to the language of the
18 contract.

19 Now as the Court has requested, we haven't moved for
20 summary judgment, but we believe the factual record here will
21 make it quite clear that the Court should grant judgment and
22 our plan is to move for judgment at the end of the plaintiff's
23 case.

24 Now one of the things that struck me about the
25 openings this morning was the fact that LightSquared and

LIGHTSQUARED, INC., ET AL.

80

1 Harbinger completely ignored the plain language of the relevant
2 contractual provision, the transfer restrictions. That's the
3 elephant in the room that nobody'll talk about here.

4 And through this litigation, what LightSquared and
5 Harbinger are asking this Court to do is to rewrite the
6 transfer restrictions in their own credit agreement. They want
7 the Court to ignore exactly what that credit agreement says and
8 they want the Court to ignore the fact that LightSquared and
9 its very sophisticated lawyers could have negotiated broader
10 transfer restrictions. But they didn't do so.

11 And that's ultimately, Your Honor, if you take
12 nothing away from my opening, that's the fatal flaw in the
13 case.

14 When we moved to dismiss the last time in December,
15 LightSquared told the Court you couldn't rule on what the
16 contract said. And they sort of indicated that, you know, we
17 needed discovery and there would be questions about, well,
18 what's the scope of the transfer restrictions.

19 Well, now we're at trial. It's telling that
20 LightSquared is not offering any evidence, witnesses,
21 documents, about the drafting or negotiation of the relevant
22 provision, and it's actually nine words long, I counted it last
23 night, that is ultimately at the center of this case.

24 The witness list doesn't include for LightSquared
25 anybody involved in drafting or negotiating the contract, even

LIGHTSQUARED, INC., ET AL.

81

1 though Milbank was involved in doing so.

2 They're not citing any extrinsic evidence. And when
3 all is said and done, this case begins and ends with the
4 language of that transfer restriction. Because if the court
5 rules that SPSO was not a disqualified purchaser, this case is
6 over.

7 If Your Honor agrees with our interpretation of those
8 nine words, this case is over.

9 Now, it's fundamental to any tortious interference
10 case that there must be an underlying breach of contract.

11 And here, the breach is those nine words in the
12 transfer restriction.

13 Now, the transfer restriction language doesn't say
14 anything about indirect purchases, it doesn't say anything
15 about purchases by affiliates.

16 The transfer restriction simply says, and I'm the
17 first person to actually read it in this proceeding this
18 morning, "a disqualified company will include any known
19 subsidiary thereof" -- and as Your Honor well knows and made
20 the point back in October, lower case subsidiary, not defined
21 term, Subsidiary.

22 Now even worse Harbinger in their brief goes so far as
23 to say that the contract language doesn't matter. Just impute
24 the actions of Ergen to DISH and EchoStar.

25 But this is a contract case at bottom. Now contract

LIGHTSQUARED, INC., ET AL.

82

1 interpretation, as the Court knows, is a legal issue for the
2 Court to decide.

3 The Court must decide whether the contract language --

4 THE COURT: Let me ask you a question,
5 hypothetically -- not this case or not anything that has been
6 previewed in this case.

7 There's evidence that, in fact, Mr. Ergen intended
8 this to be for DISH's benefit, that there is correspondence
9 between, hypothetically, between Mr. Ergen and Mr. Kiser that
10 says I want to get this for DISH, looks like it violates the
11 credit agreement, let's do indirectly what we can't do
12 directly.

13 In other words, there's evidence supporting the
14 theory, I think it was Harbinger used the word, front. Mr.
15 Falcone used the word, front.

16 Suppose that were a stipulated fact, okay, and now put
17 that together with your statement, which I agree with as a
18 matter of law, it's about the contract, it's about the words of
19 the contract. Okay. We have evidence that this was a front
20 for DISH. Who wins?

21 MR. GIUFFRA: We do, Your Honor. And we win because
22 LightSquared and its very sophisticated lawyers know how to
23 draft the type of ironclad transfer restrictions that they now
24 want the Court to rewrite into the contract.

25 THE COURT: So even though -- so I read the contract

LIGHTSQUARED, INC., ET AL.

83

1 and the words say what they say, obviously, and I have to
2 figure out what they mean. And in the face of evidence that
3 this was a conspiracy, a front, a sham, a pass-through,
4 whatever labels you want to put on it, in the face of evidence
5 that that is true, nonetheless it's your view that I should
6 interpret the contract to mean that this purchase was okay?

7 MR. GIUFFRA: Your Honor, they haven't put forward any
8 extrinsic evidence challenging that, nothing.

9 THE COURT: I'm just asking you the hypothetical .

10 MR. GIUFFRA: The language, courts -- courts typically
11 in New York State look, particularly in contracts involving
12 sophisticated parties, to the words in the contract. And they
13 hold those sophisticated parties to those words because those
14 sophisticated lawyers and in this case Latham & Watkins and
15 Milbank Tweed, they can draft -- and I'm going to show you in a
16 second how the drafting history of this contract worked out --
17 but there is nothing wrong, absolutely nothing with the parties
18 structuring a transaction that complies with a transfer
19 restriction even if a different transaction wouldn't comply.

20 That's what lawyers are paid to do every day.

21 And what happened here, Your Honor, was UBS, as the
22 administrative agent which was represented by Latham & Watkins,
23 had incentives to have a narrower transfer restriction. And
24 they wanted the debt to be attractive to the market and they
25 wanted eligible assignees to be broader.

LIGHTSQUARED, INC., ET AL.

84

1 So as a result of what was arm's-length negotiation
2 involving top law firms, we got a more narrow transfer
3 restriction.

4 I'll take the court in a minute exactly through how
5 that drafting history went down, and it's pretty clear that
6 these sophisticated lawyers could have drafted this language in
7 a way that would have clearly picked up Mr. Ergen or some
8 entity controlled by Mr. Ergen.

9 But it's a fundamental principle of New York contract
10 law that you first look to the words and you apply the words,
11 and that's because sophisticated parties have to be held to the
12 deal that they struck, not some other deal. Otherwise, words
13 would have no meaning and in every case you would start to be
14 looking at, well, sort of, what might people have intended.

15 And, so, you know, this case has to be evaluated by
16 the language of the transfer restriction, nothing more, nothing
17 less.

18 And that's where in our view the case begins and ends.

19 Now let me start with a few propositions in terms of
20 the breach of contract, which is the first element of the claim
21 of tortious interference.

22 Here, SPSO did not breach the credit agreement.
23 Without a breach, there's no tortious interference.

24 SPSO, by the plain language of the nine words on the
25 contract, is ineligible assignee.

LIGHTSQUARED, INC., ET AL.

85

1 The plain language of this contract says, again,
2 disqualified company will include any known subsidiary thereof.
3 "Known subsidiary."

4 Now the word subsidiary means, and we cite cases in
5 our papers, controlled by another corporation, by ownership of
6 at least a majority of the shares.

7 Black's Law Dictionary talks about controlling share.
8 DISH and EchoStar don't own one share of SPSO. Nothing. Zero.
9 They don't have controlling share of SPSO.

10 In fact, the evidence in this case will show that DISH
11 and EchoStar have no economic interest, no voting power, they
12 have no up side, they have no down side. It's all on Mr. Ergen
13 because the evidence -- and we've taken discovery, we're out of
14 the realm of speculation -- owns SPSO solely in his personal
15 capacity.

16 And let me take you through, Your Honor, the drafting
17 history. Because this is really important to get out.

18 Now LightSquared tried but was unsuccessful in getting
19 a broader transfer restriction.

20 And in fact, the drafting history makes clear, as the
21 plain language of the contract does, that the current transfer
22 restriction is not broad enough to include the "agency" and"
23 indirect purchaser" theories that LightSquared wants to
24 advance.

25 In facts the words agency and the words indirect

LIGHTSQUARED, INC., ET AL.

86

1 purchaser, that could have been put in the contract if they
2 wanted to negotiate that.

3 Let's put up slide 4 in the book I've given Your
4 Honor. This is a September 18, 2010, credit agreement draft
5 from Latham & Watkins. And they're representing UBS.

6 And hey have a provision which provides that an
7 eligible assignees shall not include the borrower or any of its
8 affiliates or subsidiaries and any natural person or any person
9 listed on schedule 101 A.

10 So those were the people that DISH and EchoStar would
11 have been listed on that provision.

12 And then Milbank, they don't like that proposal, so
13 they come up and -- let's put up slide 5 -- they change the
14 language and they say let's add the word competitor, in the
15 September 19, 2010 draft.

16 And they have, you know, that a competitor is not an
17 eligible assignee. And then they propose defining competitor
18 to mean any person listed in the schedule and then any
19 affiliate any such person, which would have picked up Mr. Ergen
20 and SPSO and we wouldn't be here to do.

21 Now what happens next? Let's turn to slide 6. Latham
22 & Watkins comes back on behalf of UBS which wants a narrower
23 restriction and they come back with the language that
24 ultimately appears in the contract.

25 They take out this competitor language. They don't

LIGHTSQUARED, INC., ET AL.

87

1 agree to the affiliate language. And they agree to a
2 disqualified company will include any known subsidiary thereof.
3 Known subsidiary.

4 That's because these restrictions are intended to
5 apply to people selling the debt. That someone who is a holder
6 of the debt can't sell the debt to a known subsidiary of a
7 disqualified company.

8 There is no evidence that SPSO is a known subsidiary
9 Of DISH or EchoStar. Zero. De nada.

10 Again, let's go to slide 7. Final words, and again
11 this is what this case is ultimately about, these nine words.
12 It's not about all the innuendo, it's not about all the
13 speculation. It's about Your Honor's interpretation of these
14 nine words.

15 We had a situation where through arms length
16 negotiations sophisticated counsel came upon these words, and
17 they affirmatively rejected broader language.

18 Now we know that the evidence will show that in May
19 2012 LightSquared added DISH to the list of disqualified
20 companies. Even though EchoStar was already on the list. They
21 added them.

22 That sort of confirms that control affiliate doesn't
23 work, because they made a decision themselves in May 2012 to
24 add DISH. And how parties act in light of a contract isn't
25 something the Court can take into account in interpreting the

LIGHTSQUARED, INC., ET AL.

88

1 contract.

2 Now Section 10.04 of the credit agreement requires
3 that the disqualified company be known to the lender.

4 There is no evidence here that any lender knew or even
5 suspected that SPSO was a subsidiary of DISH.

6 In fact, LightSquared claims the opposite. They claim
7 that SPSO sought to conceal the fact that there was some
8 connection to avoid market speculation.

9 In addition, Your Honor, Section 10.04B, and this is
10 slide 8, applies to the lender. It restricts the lender. It
11 doesn't talk about the person who obtains the debt. The
12 provision was intended to apply to assignments by lenders.

13 And there is a case, Your Honor, which we cite in our
14 papers, involving Citibank, it's a Second Circuit case 1983
15 where the Second Circuit held that under New York Law and anti-
16 assignment. Clause is a personal promise of the assignor and
17 gives rise to potential damages only against the assignor, not
18 the assignee.

19 And this contract by its terms applies only to the
20 assignor, not the assignee.

21 So it's pretty clear here, there's no breach, and they
22 certainly don't allege a breach by UBS, and without a breach by
23 UBS there is no tortious interference claim. In fact, UBS had
24 no duty to ascertain or inquire about any statement made by any
25 assignee here, SPSO.

LIGHTSQUARED, INC., ET AL.

89

1 Section 9.03, which we've talked about before makes
2 that quite clear.

3 THE COURT: Let me stop you on that point with respect
4 to who's the beneficiary of the rights.

5 So, again, hypothetically, if there were a breach,
6 right, you're saying that that cause of action is against the
7 assignor?

8 MR. GIUFFRA: Yes, Your Honor. In fact, the language
9 in the contract which talks about known subsidiaries, would be
10 supportive of that theory.

11 So I think there's a lot of --

12 THE COURT: I understand, I understand the point that
13 you made. But now let me ask the next question.

14 So take the contract provision and put it in the
15 bankruptcy realm. So therefore because there is only a cause
16 of action against the assignor, does that mean that there is no
17 basis if a violation were found, a breach were found for
18 equitable subordination of the claim?

19 MR. GIUFFRA: I think Your Honor would have to find a
20 breach, because it's all about the transfer restrictions. So
21 if there is no breach of the contract, presumably --

22 THE COURT: Right, so if there is a breach -- but you
23 were just saying if there is a breach it's a claim against the
24 assignor?

25 MR. GIUFFRA: Correct.

LIGHTSQUARED, INC., ET AL.

90

1 THE COURT: Okay. So if there is a breach, is that
2 the type of conduct that would support equitable subordination?

3 MR. GIUFFRA: Our position would be no, because that's
4 a drastic remedy.

5 So without this breach of the credit agreement which
6 SPSO, no tortious interference claim.

7 Now, in addition, the second element, which no one
8 talked about the elements of the claims against us in the
9 opening, they've got to prove by a preponderance of the
10 evidence that DISH or EchoStar intentionally sought to cause a
11 breach and was the proximate cause of the breach.

12 Now there is no evidence in this case that DISH or
13 EchoStar took any intentional action to cause a breach. They
14 relied totally on their flawed agency theory where they want to
15 essentially impute actions of Mr. Ergen and Mr. Kiser by virtue
16 of their corporate positions to DISH and EchoStar.

17 Now the discovery that's been taken, Your Honor, it's
18 important to talk about it, because that's why when you have a
19 trial it's different than that motion to dismiss.

20 Thousands of documents have been produced. They've
21 had access to the board minutes. They've taken thirteen
22 depositions, including Gary Howard who was a board member, who
23 was a member of the independent committee that looked at the
24 transactional issues. And the facts that are now before the
25 Court will show that Ergen purchased the debt in his personal

LIGHTSQUARED, INC., ET AL.

91

1 capacity, he was assisted by Kiser, but Kiser had previously
2 done personal financial matters for him, that he did it on his
3 own time, that the funds that were used to purchase the debt
4 were Mr. Ergen's funds, no DISH or EchoStar funds were used,
5 and that the boards learned of the purchases after the fact in
6 May.

7 There is no conspiracy between the board and Mr.
8 Ergen. And in fact, Your Honor, the board and EchoStar as I
9 mentioned before have investment policies, and let's just
10 briefly I'll be done, I promise, Your Honor, by 12:30, with the
11 slide -- let's put slide 10 up, please -- there is an
12 investment policy. Mr. Ergen notwithstanding his position at
13 the company, his stock ownership or anything else, could not
14 make an acquisition of more than 125 million in a single
15 transaction without going back to his board. EchoStar fifty
16 million.

17 These are written policies. They have no evidence
18 that they weren't followed and that they weren't followed in
19 the past.

20 In fact, in the case of the DBSD and TerraStar
21 matters, those transactions were approved by the board. They
22 were not transactions that Mr. Ergen sort of just did on his
23 own.

24 And here, there is no evidence that approval was
25 sought before the debt was bought by the board.

LIGHTSQUARED, INC., ET AL.

92

1 And the evidence will also show, as Ms. Strickland
2 pointed out that DISH itself only began considering
3 LightSquared as a potential acquisition target and they've got
4 the board minutes in May 2013 after the Sprint and Clearwire
5 deals looked like they wouldn't succeed.

6 It's also something again, and they took Mr. Howard's
7 deposition, that DISH appointed a special transaction committee
8 of independent directors to consider the opportunity because of
9 the conflict. And I talked about this in October. And the
10 appointment of that special transaction committee is
11 inconsistent with some prearranged deal between DISH and its
12 board and Mr. Ergen to use Mr. Ergen's investment in the debt
13 where he bears all the down side risk to pursue LightSquared.

14 In fact, the transaction committee went out and hired
15 counsel, Perella Weinberg did evaluation opinion before the
16 decision was made to go forward and pursue the LBAC
17 opportunity.

18 The evidence that will be presented to the Court will
19 making it clear that that special transaction committee asked
20 questions of Ergen regarding the purchases, including basic
21 information that the board didn't have, and that the board made
22 an independent decision to pursue those transactions.

23 THE COURT: Notwithstanding that the board was never
24 told the price at which the debt had been purchased?

25 MR. GIUFFRA: I think, Your Honor, the board

LIGHTSQUARED, INC., ET AL.

93

1 ultimately went forward because it was clear that once they
2 made the offer, there was no conflict given the amount of the
3 offer that was made, the 2.2 billion.

4 Now the plaintiffs in Nevada have been arguing that
5 DISH should have received the benefit, but did not.

6 And that theory, the benefit of the debt purchases,
7 that theory is obviously contrary to the position in this
8 courtroom.

9 Now it's black letter law, and we haven't talked much
10 about the law so far, the other side hasn't -- let's put up
11 slide 13 -- that a principal is liable for tortious conduct of
12 the agent only when the agent acts within the scope of the
13 employment relationship.

14 They've got the burden of proving in this courtroom
15 that Messrs. Ergen and Kiser had authority to bind DISH or
16 EchoStar with respect to these specific transactions.

17 And all transactions, all agency transactions under
18 New York Law require manifestation ever consent by one person
19 to another.

20 And here they simply say all you've got to do is point
21 to positions in a company and say, well, we've got it, we've
22 got agency -- and they even go so far, we heard a little bit of
23 this morning, where they treat Mr. Ergen as both the principal
24 and the agent, a theory Your Honor rejected in the earlier
25 decision Your Honor wrote.

LIGHTSQUARED, INC., ET AL.

94

1 And the fact that --

2 THE COURT: Well, I don't think I specifically
3 rejected it. I think I made the observation that I didn't
4 really understand how as a matter of law it worked.

5 MR. GIUFFRA: I don't think it works, Your Honor, and
6 they haven't cited a single case where it does work.

7 The mere fact that Mr. Ergen and Mr. Kiser performed
8 similar functions for DISH and engaged in these transactions
9 for Mr. Ergen's personal benefit where he bears all the risk,
10 that doesn't turn them into actions of, doesn't turn them into
11 actions of DISH. Speculation about what Mr. Ergen had in his
12 mind, we've heard that, that's in the papers. That was in
13 LightSquared's brief at page 18 -- what was in his mind -- that
14 means nothing.

15 They ultimately have to resort to this theory of,
16 like, what was in Mr. Ergen's mind as opposed to what did the
17 Board of Directors know and approve and do, and what did the
18 corporate rules that bind Mr. Ergen say.

19 Because that's the only way they can get past go.

20 Now the investment limits, set limits on Mr. Ergen and
21 Mr. Kiser's authority. And this is not a case -- look, they'd
22 have a much better case if they can show that money from DISH
23 or EchoStar was used to buy this debt. They'd have a much
24 better case if they could show there was an indemnity agreement
25 between DISH and EchoStar and Mr. Ergen. They don't have it.

LIGHTSQUARED, INC., ET AL.

95

1 Every trade that was engaged in by Mr. -- the first
2 trade that closed, okay, the very first one, exceeded the 125
3 million-dollar threshold.

4 So they would have had to go back to the board,
5 because --

6 THE COURT: I'm sorry.

7 MR. GIUFFRA: Let me restate that. The first trade
8 they did was more than 125 million. The way the policy is
9 written --

10 THE COURT: Where are you getting that fact from?

11 MR. GIUFFRA: Let's go back to slide 10.

12 MS. STRICKLAND: It was the second trade, not the
13 first.

14 MR. GIUFFRA: Second trade, I'm sorry.

15 If Your Honor looks at the investment policy, it says
16 that unless otherwise permitted by the corporation's cash
17 management policy, and that's basically buying treasuries--

18 THE COURT: Right.

19 MR. GIUFFRA: -- you can't engage 125 million dollars
20 in a single transaction or series of related transactions
21 without approval by the board.

22 THE COURT: Okay.

23 MR. GIUFFRA: So once he does a transaction that's
24 more than 125 million --

25 THE COURT: Right.

LIGHTSQUARED, INC., ET AL.

96

1 MR. GIUFFRA: -- in this debt, they've got to go back
2 to the board. They've got to go to the board --

3 THE COURT: Right. But that didn't happen until the
4 Icahn trade. So I'm just, I'm just focusing on the fact that
5 you said the first trade. That's not true.

6 MR. GIUFFRA: I misspoke, Your Honor.

7 THE COURT: Okay. You hit that number when you
8 aggregate the first set of trades that occurred in April and
9 May prior to the Icahn trade, you don't get to that number.

10 MR. GIUFFRA: Yes, that's correct, Your Honor. But
11 still, Your Honor, all the rest of the trades --

12 THE COURT: I understand.

13 MR. GIUFFRA: There is no question about that.

14 THE COURT: I was just focusing on what you said.

15 MR. GIUFFRA: I'm trying to rush through.

16 THE COURT: You don't have to rush through. We can
17 pause and we can keep going, so.

18 MR. GIUFFRA: Okay. Now again, Your Honor, the
19 evidence will show that he disclosed the transactions after
20 they were completed in May of 2013.

21 The fact that Ergen acknowledged when asked by the
22 general counsel and by a second executive of the company there
23 was some truth to the rumor, that he was personally buying
24 debt, says nothing about whether DISH or EchoStar knew about
25 the transactions in advance, or were the beneficiaries of those

LIGHTSQUARED, INC., ET AL.

97

1 transactions.

2 These were personal trades, again, where he bore all
3 the risk.

4 THE COURT: Let me ask you a question. Is Mr. Kiser
5 an officer of DISH and EchoStar?

6 MR. GIUFFRA: He's an officer of DISH.

7 THE COURT: You have to help me with the corporate
8 governance technicalities. Is he an executive officer? In
9 other words, does he have fiduciary duties to the company?

10 MR. FRAWLEY: We can assume for purposes, yes.

11 MR. GIUFFRA: For purposes of this matter we'll assume
12 that.

13 THE COURT: Okay, go ahead.

14 MR. GIUFFRA: But again, Your Honor, we're not in a
15 Nevada courtroom where we are saying Mr. Ergen is using --

16 THE COURT: I know we're not in a Nevada courtroom and
17 I -- don't anyone speculate what I mean by that statement. And
18 I know that throughout and going forward you're going to
19 continue to draw a distinction between the issues that are
20 being raised in Nevada and here.

21 In my mind there is a nexus, though. There is a
22 nexus, and it's not so much via the nine words that you've been
23 pointing me to, but it's more in the, as the case has
24 developed, more in the equation that the plaintiffs are urging
25 between Mr. Ergen on the one hand and DISH on the other hand.

LIGHTSQUARED, INC., ET AL.

98

1 So, therefore, it's of interest to me, how Mr. Kiser
2 functioned, what he viewed his responsibilities as, whether or
3 not when he is the recipient of a request by Mr. Ergen and he
4 puts on his personal friend/advisor hat, whether he was
5 obligated at that moment also to have the interest of the
6 corporation and its shareholders in mind.

7 And I'm interested in that not because I'm deciding
8 any dispute between the shareholders of DISH and Mr. Ergen and
9 the company, but because I believe that it's relevant to the
10 separation that you're urging me to find exists between Mr.
11 Ergen as chairman and as a DISH shareholder on the one hand and
12 DISH's corporate existence on the other hand.

13 MR. GIUFFRA: Well, Your Honor, the testimony will
14 actually show that Mr. Kiser believed that his actions that he
15 was engaged in in assisting Mr. Ergen were not for DISH, were
16 not for EchoStar, and were not within the scope of what his
17 authority for DISH or EchoStar.

18 So he thought he was assisting Mr. Ergen in his
19 personal capacity. In fact, the law and we cite a case from
20 the Bankruptcy Court In Re Motors 2013, and in looking at
21 agency the understanding of the purported agent is important.

22 And you'll hear testimony that Mr. Kiser believed that
23 he wasn't acting, to the extent he was working on these trades,
24 for DISH or EchoStar.

25 And again, they have absolutely no evidence that DISH

LIGHTSQUARED, INC., ET AL.

99

1 or EchoStar had any control over or could have had any control
2 over what was Mr. Ergen putting his own funds, his family's
3 funds, his daughter's funds, at risk to buy this debt.

4 Again, they'd have a better case if they could show an
5 indemnity agreement or some loan, or something, where you could
6 change the economics. But the economics and the evidence will
7 show and the discovery they've gotten now, so we're not in
8 motion to dismiss-land anymore, it's Mr. Ergen's money and he
9 bears the risk.

10 Now the argument that was made that the unauthorized
11 actions of an agent can still be imputed to a principal is
12 wrong as a matter of law.

13 In fact, once the DISH board learned of the
14 investment, they formed a special transaction committee as
15 we've talked about.

16 Let's take a moment while you're pausing to pause and
17 figure out what we're going to do next, because it's now 12:25.

18 Is there anyone else who wants to make an opening
19 statement?

20 And do you folks wants to take your lunch break at
21 12:30 and then start with the witnesses after that?

22 MR. STONE: We think that makes sense, Your Honor.

23 THE COURT: All right. Thank you, Mr. Stone. And how
24 much time collectively do you think you'd like. How much time
25 would you like? Would you like an hour?

LIGHTSQUARED, INC., ET AL.

100

1 MR. STONE: Yeah, one hour is fine.

2 THE COURT: All right. Then let's try to finish and
3 if I have to be a few minutes late, I'll get a demerit.

4 MR. GIUFFRA: We will be done, Your Honor.

5 Now the breach of contract claim that they've put
6 forward against SPSO is premised on SPSO being a sub of DISH
7 and then Kiser and Ergen acting as agents of DISH.

8 Now if LightSquared were to prevail, there can't be a
9 tortious interference claim against DISH or EchoStar because
10 the agency and the imputation theories are entirely defeat the
11 tort claim.

12 The acts of an authorized agent are the acts of a
13 principal. And if the acts of Ergen and Kiser, we don't think
14 they should be, imputed to DISH, there can't be a tort or
15 tortious interference because DISH couldn't have induced itself
16 to breach a contract, and a parent can't be liable in tort for
17 causing a subsidiary to breach a contract in furtherance of the
18 parent's financial interest. We talked about that I think back
19 in December.

20 And so basically they have two theories that are in
21 conflict with one another, the agency theory and their
22 imputation theory, and then their tortious interference theory.

23 Two last points and then I'll be done.

24 There is -- one of the elements of a tortious
25 interference claim is you've got to show damages. And they've

LIGHTSQUARED, INC., ET AL.

101

1 got to show actual damages, not speculative damages. They
2 can't adopt a wait and see approach and see what happens in
3 plan confirmation.

4 THE COURT: Why can't they wait and see what happens
5 in plan confirmation?

6 MR. GIUFFRA: Because damages have to be, you have to
7 have the damages when you bring the claim. And they don't
8 have --

9 THE COURT: Well, they're alleging that they have
10 damages, they just can't quantify them yet.

11 MR. GIUFFRA: Well, the damages they have are
12 speculative and you don't get the benefit of bringing a
13 tortious interference claim against the party based on
14 speculative damages.

15 And in fact, in this case, the allegation that they've
16 made is that the presence of SPSO in the capital structure in
17 some way damaged LightSquared.

18 Now, we know that for almost a year LightSquared knew
19 or assumed, let's just take even that inference, that Ergen was
20 behind SPSO. They did nothing --

21 THE COURT: All right, well, that's a different point,
22 though, that's a point about, you know, waiver, estoppel et
23 cetera -- I think that's a different pointed then whether or
24 not they've sustained damages that are not capable of final
25 calculation yet.

LIGHTSQUARED, INC., ET AL.

102

1 MR. GIUFFRA: But they've got no evidence to support
2 that.

3 I think the Falcone -- we'll put up slide 15 again
4 because I think it's so telling -- where Mr. Falcone is
5 literally e-mailing with Reuters and saying and telling a
6 reporter that he thinks Ergen is the party that's buying the
7 debt, and he's hoping that that press story that might get
8 prompted will prompt strategic to step in.

9 That sort of belies, Your Honor, the notion that the
10 presence of Ergen is somehow going to, in the capital
11 structure, is going to in some way damage the debtor. The guy
12 who actually was controlling this whole operation was telling
13 the press, you know, sort of tell the world Ergen is involved
14 and that must mean that other people will think it's a good
15 deal and they'll get in and we'll start a bidding war.

16 So you can't have it both ways. You can't sort of say
17 the presence of Ergen is a bad thing, and then basically try to
18 basically put Ergen out there and say if Ergen thinks this is a
19 good investment, maybe some other rich person will come in or
20 some other rich hedge fund-type personality will come in.

21 So this e-mail under cuts the argument of any harm
22 whatsoever, and without harm they have no plan.

23 Now they have no evidence that LightSquared would have
24 succeeded in negotiating and confirming a plan during the
25 exclusivity period absent SPSO's debt acquisition. Nothing.

LIGHTSQUARED, INC., ET AL.

103

1 And we have testimony which Your Honor will hear from
2 Steve Zelin of Blackstone who was the banker for the ad hoc
3 group, and that testimony will show that SPSO was not the
4 reason LightSquared failed to obtain financing from Jefferies.

5 And during his deposition, we got some deposition
6 clips, so these are ours, Mr. Zelin, a highly respected member
7 of the restructuring community said "the market was just not
8 receptive to the financing structure that was being put in
9 place, even though part of the structure was one where those
10 who committed would actually receive ticking fees and payments.
11 I think the market just looked at the overall situation and the
12 uncertainty and ultimately decided that the assets, even with
13 regulatory approval, were not attractive enough to provide two
14 and a half plus billion dollars of financing to take our
15 clients out."

16 And let's turn to slide 17. And this is Mr. Zelin.
17 SPSO "did not interfere at all with our negotiations with
18 Harbinger." He further went on to testify, a consensual deal
19 was not reached because "we couldn't agree to terms." We, as
20 time went on and discussions continued, realized that -- and
21 I've added this -- Mr. Falcone was looking for far more
22 optionality and far greater economics. He was not willing to
23 give up as much economics as our clients were comfortable
24 giving. The perceived risk they were taking, the economic
25 terms that were available in the overall deal did not make

LIGHTSQUARED, INC., ET AL.

104

1 sense when compared to the alternatives.

2 And then Mr. Zelin at 104 of his transcript went on to
3 say SPSO's trading had "zero impact on why the deal with
4 Harbinger broke down."

5 They have no evidence, Your Honor, none, of damages
6 based on their Mr. Ergen is in the capital structure theory.
7 It's purely speculative.

8 This bankruptcy proceeding has not reached a
9 conclusion. And any harm is pure speculation. And Mr. Zelin's
10 testimony belies any theory that they've put forward.

11 Let me just say a word about the releases and I know
12 Your Honor asked about that the last time I was here.

13 It's not relevant to a tortious interference claim
14 against DISH and it's not --

15 THE COURT: It's relevant to the breach of the credit
16 agreement claim.

17 MR. GIUFFRA: And as Your Honor is aware, the release
18 provision is a general release that was included in the
19 agreement between LBAC and the ad hoc secured group. It does
20 not require the allowances of any bankruptcy claim. It's a
21 general release of the type a buyer would expect in any --

22 THE COURT: That's contrary to the answer to that
23 question that Ms. Strickland gave me some weeks ago. So we
24 don't have to resolve this now, but that answer is contrary to
25 what was put on the record some weeks ago.

LIGHTSQUARED, INC., ET AL.

105

1 MR. GIUFFRA: Well, Your honor, I think Your Honor in
2 this case, there is a question as to why would LBAC want this
3 release.

4 Well, in asking the question, you know, we sort of
5 need to, can't look at the claims that are being brought right
6 now. And they brought claims against DISH and EchoStar for
7 hundreds of millions of dollars based on SPSO's actions in this
8 case.

9 So this case is a poster child for why someone would
10 want a broad release. Buyers typically ask for broad releases.
11 And I think they're trying to find something sinister in a
12 release that is limited to the seller, the LightSquared LP
13 debtors, it doesn't impact third parties such as Harbinger or
14 the debtors that are not released.

15 THE COURT: But you're skirting over the question of
16 why it was that when the LBAC bid hit the special transaction
17 committee, they never peeled back the layers of the onion and
18 made any inquiry or determination as to how the price might
19 have been affected, in other words, been made more favorable to
20 DISH as the potential acquirer, ultimate acquirer as the
21 putative parent of LBAC, right?

22 If the price would go down, if SPSO was taken out of
23 the release.

24 I understand your point with respect to LBAC and
25 remember the timing, LBAC was born, being owned by Mr. Ergen

LIGHTSQUARED, INC., ET AL.

106

1 and then was sold to DISH for a dollar at a certain point, I
2 believe.

3 So that doesn't answer the question. So the
4 recitation that, you know, this is always the way it's done and
5 of course the purchaser would want a release does not answer
6 the question of to what extent the special committee did or did
7 not and why it did or did not look into the release that
8 relates to Mr. Ergen, because if there is a true separation
9 then the special committee really shouldn't have cared whether
10 or not that debt got allowed. It was making a determination
11 how much to pay for an asset, for the spectrum.

12 MR. GIUFFRA: Yeah, but that release, Your Honor,
13 there is nothing specific in it to Ergen or an SPSO bankruptcy
14 claim. This is an issue that may be relevant in the Nevada
15 litigation, but to say that it's relevant now in this
16 litigation when the parties normally ask for these kinds of
17 releases -- and in fact, LightSquared has never asked and has
18 never asked to negotiate the release or any other provision of
19 the asset purchase agreement.

20 So you know, if there was a negotiation, maybe we
21 discuss what the terms of the release would be, but that hasn't
22 happened, and obviously the court in Nevada has instructed how
23 that negotiation should be conducted in and when it ever
24 happened. Our view, Your Honor, is that this release issue is
25 a red herring in this case.

LIGHTSQUARED, INC., ET AL.

107

1 Now to sum up, Your Honor, we believe that the suit
2 against DISH and EchoStar is a sideshow, that LightSquared
3 should have been concerned with protecting its creditors, not
4 Harbinger. That instead of engaging in copycat lawsuits,
5 LightSquared should have been focused on engaging with LBAC and
6 building consensus behind a confirmable plan.

7 And, Your Honor, again, the plain language of these
8 transfer restrictions, the nine words that I've been harping
9 on, in settled principles of law, of contract interpretation,
10 and settle of law of agency relationships are fatal to the
11 claims that LightSquared had brought in this action.

12 Discovery has shown there is no evidence to support
13 the speculation.

14 Ultimately this is Mr. Ergen's transaction. He bears
15 the risk. His money was put at risk. There is no secret deal.
16 It's speculation.

17 And again, Your Honor, the nine words control. And if
18 Your Honor interprets those words and looks through the
19 drafting history and sees that the sophisticated lawyers who
20 were involved in drafting that provision could have drafted a
21 much broader provision, but did not do so -- and in fact the
22 proposal of Milbank was rejected for the language, the nine
23 words we have, lower case subsidiary, we are confident, Your
24 Honor, that after the plaintiff's case when I stand here again
25 asking for judgment that Your Honor will granted judgment to

LIGHTSQUARED, INC., ET AL.

108

1 DISH and EchoStar because they haven't pled the elements of a
2 tortious interference claim, everything from breach of contract
3 to no damages.

4 Thank you.

5 THE COURT: All right. Thank you very much.

6 All right. Mr. Sussberg, did you have something?

7 MR. SUSSBERG: Because I know you need to run. Joshua
8 Sussberg from Kirkland & Ellis. What was just said about the
9 release and the lack of discussion and involvement absolutely
10 one hundred percent false.

11 THE COURT: Okay. We've had a very excellent morning
12 of very thoughtful and well-done argument. So let's leave it
13 at that and now I look forward to hear the facts when I come
14 back. I'll see you in about an hour.

15 You're free to leave your things here.

16 MR. BARR: Thank you, Your Honor.

17 (Recess from 12:36 p.m. until 1:44 p.m.)

18 THE CLERK: All rise.

19 THE COURT: Please have a seat.

20 All right. Is everyone back who needs to be back?

21 Okay, Mr. Stone.

22 MR. STONE: Good afternoon, Your Honor. For the
23 record Alan Stone from Milbank here on behalf of the debtors.

24 Your Honor, I rise only to call our first witness and
25 to introduce the Court to Michael Hirschfeld, my partner who

LIGHTSQUARED, INC., ET AL.

109

1 has not yet appeared in this case --

2 THE COURT: Okay.

3 MR. STONE: -- and he will present our first witness.

4 THE COURT: All right.

5 MR. STONE: So with that the plaintiffs call Douglas

6 Smith.

7 THE COURT: All right.

8 How are you, Mr. Smith? Would you raise your right
9 hand, please?

10 (Witness sworn)

11 THE COURT: Have a seat, please.

12 Ready when you are.

13 MR. HIRSCHFELD: Thank you, Your Honor.

14 DIRECT EXAMINATION

15 BY MR. HIRSCHFELD:

16 Q. Mr. Smith, for the record, could you tell the Court by
17 whom you are employed?

18 A. LightSquared.

19 Q. In what capacity are you currently employed by
20 LightSquared?

21 A. I'm the chairman and chief executive officer.

22 Q. And how long have you been employed by LightSquared?

23 A. Since April of 2010.

24 Q. And in what capacity did you, were you employed when you
25 joined LightSquared in April 2010?

LIGHTSQUARED, INC., ET AL.

110

1 A. My initial role was chief network officer.

2 Q. And could you explain to the Court what your functions
3 were for LightSquared as chief network officer?

4 A. Sure. As chief network officer, I was responsible for all
5 of our technical aspects of the business, building out the
6 terrestrial network itself and operating the satellite network.

7 Q. And just briefly what's the difference between a satellite
8 network or the satellite as you referred to it and the
9 terrestrial network?

10 A. So the satellite-based network is a network that provides
11 signal and coverage across our coverage area from a satellite
12 that's in orbit.

13 The terrestrial network itself is a network that is built
14 on the ground, so it's an earth-based network, we put antennas,
15 transmitters on towers that aren't visible on ground.

16 THE COURT: Mr. Smith, if you would pull that
17 microphone a little bit closer to you, that's great. Thank
18 you.

19 Q. And after serving as chief network officer, did you have
20 another position with LightSquared?

21 A. Yes, I did. In February of 2012 the role changed to co-
22 chief operating officer.

23 Q. And you were co-chief operating officer with whom?

24 A. Marc Montagner who is our CFO.

25 Q. And what were your responsibilities and duties as co-chief

LIGHTSQUARED, INC., ET AL.

111

1 operating officer of LightSquared?

2 A. So at the time LightSquared did not have a chief executive
3 officer. So between the two of us we filled that will role and
4 had overall responsibility for the business.

5 Q. And when did you become the chief executive officer and
6 chairman of LightSquared?

7 A. That would have been July of 2012.

8 Q. As a result of your employment with LightSquared and the
9 positions that you've described, are you generally familiar
10 with the business of LightSquared?

11 A. Yes, I am.

12 Q. Could you trace for the Court please your educational
13 background beginning with college and indicate where you went
14 to school, what degrees you got, and when?

15 A. Sure. So I have a bachelor of science degree in
16 electrical engineering from Merrimack College. I received that
17 in 1990. I have a masters degree in the management of
18 technology from the University of Pennsylvania received in
19 2001.

20 Q. And could you please trace for the Court your employment
21 history after graduation from college?

22 A. Sure. So after college, I joined GTE. My -- initially I
23 joined that into a management-training program, got different
24 exposure to different business units within GTE. GTE is now
25 part of Verizon.

LIGHTSQUARED, INC., ET AL.

112

1 During that experience one of my assignments was with GTE
2 mobile net. That was their wireless division or their cellular
3 division at the time. That's where I spent the rest of my
4 time. I enjoyed it. I stayed in that division for the three
5 years that I was at GTE.

6 When I left GTE, I went to Nextel in 1993. And I joined
7 Nextel in a similar capacity doing network engineering and
8 planning, network design build-out and operations.

9 Q. What was the business of Nextel when you joined it?

10 A. At the time Nextel was a start-up business. Its existing
11 operations were two-way radio-type communications, but had
12 plans to build out a cellular network to compete with the
13 cellular duopoly that existed at the time.

14 Q. And during the time that you were with Nextel, did your
15 duties involve the build-out of the cellular network?

16 A. Yes, it did.

17 Q. For how long did you remain with Nextel?

18 A. I stayed at Nextel and what became Sprint Nextel, I think
19 it was a total of sixteen or seventeen years.

20 Q. And can you tell the Court what titles, if any, you had
21 during your tenure at Nextel or Sprint Nextel?

22 A. Sure. There were a number of different titles. I think
23 initially I was a director of RF engineering. RF engineering
24 stands for radio frequency engineering. It's all of the
25 spectrum-based planning and engineering of the wireless

LIGHTSQUARED, INC., ET AL.

113

1 networks, essentially the wireless component of the wireless
2 networks.

3 Roles changed. There were a number of different titles, I
4 think there was vice president of national technical support.

5 When I was promoted to take full responsibility for
6 national operations of the Nextel national network, I had a
7 role that was vice president of strategy and standards, still
8 doing all of the wireless RF planning for the company.

9 At that point I think that was post-merger with Sprint, so
10 that would have been for all of Sprint Nextel networks.

11 I was vice president of network engineering at Sprint
12 Nextel as well. And in that role I had responsibility for all
13 of Sprint's national and international wire line and wireless
14 networks.

15 And the last role that I had at Sprint Nextel was chief
16 technical operations officer for a division of Sprint that was
17 building out Sprint's first 4G networks. We were building on a
18 network which was a WiMAX-based network. WiMAX, at the time,
19 was a competing technology with LTE. It was a bit earlier than
20 LTE. And Sprint embarked on building out a WiMAX network and I
21 was responsible for that program.

22 That ultimately led to a spinoff where Sprint spun off
23 this business unit that I was in, merged it with a company
24 called ClearWire, and I went with that spinoff and became a
25 ClearWire employee. I was there just for a few months, and

LIGHTSQUARED, INC., ET AL.

114

1 then left the ClearWire company.

2 Q. Okay, so that takes us, if I can do the math correctly,
3 into about 2009, is that correct?

4 A. That's correct.

5 Q. Okay. And what did you do after you left ClearWire in
6 2009?

7 A. So in 2009 I did independent consulting. I had a few
8 clients, and which SkyTerra was one, SkyTerra was the
9 predecessor company to LightSquared. Harbinger Capital was
10 another. And it was through those engagements that I came to
11 join LightSquared as an employee in 2010.

12 Q. Would it be accurate to say that you've spent your entire
13 working career working in the telecommunications industry?

14 A. Yes, that's accurate.

15 Q. And during your work within the telecommunications
16 industry, have you been primarily involved in activities that
17 require an understanding of wireless spectrum?

18 A. Yes, absolutely. In all of my roles the one thing that
19 has been consistent is I've continually had responsibility for
20 the spectrum deployment operations and design of the networks
21 for the companies that I've been employed at.

22 Q. Let me ask you this. Are you, do you have any level of
23 familiarity with the wireless spectrum that Dish Networks has?

24 A. Yes, I do, more so with their terrestrial spectrum, not so
25 much with their satellite-based spectrum.

LIGHTSQUARED, INC., ET AL.

115

1 Q. What's the basis for your familiarity with that component
2 of DISH's spectrum?

3 A. Well, the basis would just be I generally keep abreast of
4 what is happening with spectrum in the industry and seek to see
5 what spectrum is being made available for wireless networks, as
6 that's the industry that I'm in.

7 So I have an understanding of generally spectrum just
8 generally I track it and follow it as part of the
9 responsibilities that I had in my job.

10 On the specific aspects of the spectrum that DISH has, the
11 terrestrial spectrum that they have, I follow that one closely
12 just because it's similarly situated spectrum and some of the
13 decisions that have been in front of the FCC are certainly
14 pertinent and relevant to what we do at LightSquared. So from
15 that perspective I follow that very closely and then -- and
16 have spent a fair amount of time looking at that spectrum,
17 following those proceedings, and staying up to date with what
18 was happening.

19 Q. Do you know what the term AWS-4 refers to?

20 A. Yes, I do.

21 Q. Can you tell the Court what that refers to?

22 A. Sure. It's the FCC's designation for forty megahertz of
23 spectrum that DISH has a license for.

24 Q. So what are the numeric designations of spectrum that are
25 associated with the AWS-4?

LIGHTSQUARED, INC., ET AL.

116

1 A. So AWS-4 is two blocks of twenty megahertz each. The
2 first block starts at 2000 megahertz and extends from 2000
3 megahertz to 2020 megahertz. And that, by the way, was
4 initially designated as the uplink block, uplink meaning that's
5 what the phone transmits back up to the network.

6 The second block is -- starts at 2180 megahertz and
7 extends to 2200 megahertz, and that block was designated as the
8 downlink block, or the transmitter that would be based on the
9 tower, so transmitting down from the network to the device
10 itself.

11 Q. Are you familiar with how DISH came to hold the spectrum
12 assets in the AWS-4 band?

13 A. Yes, I am.

14 Q. Could you tell the Court how you understand them to have
15 acquired those?

16 A. Sure. Well, I think it appeared that DISH has had an
17 interest in that spectrum for some time.

18 Going back into the first year, as I was aware of DISH's
19 interest in broadband spectrum would have been and their
20 participation in what was a set of auctions for other AWS
21 spectrum blocks, that was an auction that took place in 2006.
22 It was a very robust auction, and at the time, DISH or EchoStar
23 had a kind of a partnership with DIRECTV and they were a bidder
24 in that spectrum auction, much like the cable companies formed
25 an alliance and a partnership and they also bid for some of the

LIGHTSQUARED, INC., ET AL.

117

1 spectrum.

2 Q. Were they a successful bidder at that time, DISH or
3 EchoStar and DIRECTV?

4 A. No, they were not; they were not.

5 Q. What are you next aware of EchoStar and DISH attempting to
6 do with respect to spectrum?

7 A. So after 2006 and after that auction where they did not --
8 where they left without any licenses, they started to make
9 investments in spectrum; more specifically it was in TerraStar
10 in DBSD.

11 Q. And when, if you recall, did they make those investments
12 for the first time?

13 A. I believe 2008 was the first investment in TerraStar.

14 Q. And what was the business of TerraStar at the time
15 EchoStar made its investment?

16 A. So at the time it was very similar to what LightSquared's
17 business was which was a satellite-based operator that was
18 seeking terrestrial rights to use its satellite spectrum to
19 build a terrestrial network. And they were really -- the three
20 companies that were doing so was LightSquared, its predecessor
21 companies, TerraStar and ICO, or DBSD, as it's known.

22 Q. Is ICO the predecessor to DBSD?

23 A. Yes.

24 Q. Now, is it true that DISH or EchoStar eventually acquired
25 DBSD and TerraStar?

LIGHTSQUARED, INC., ET AL.

118

1 A. Yes, that's true.

2 Q. Can you describe for the Court generally the history, the
3 regulatory history relating to those acquisitions of TerraStar
4 and DBSD by DISH?

5 A. Sure. So from a regulatory perspective, again these two
6 companies were following a very similar path that LightSquared
7 was following. So there were, I believe their first ATC
8 licenses for the two companies were issued sometime in the
9 2008-2009 time frame. Those licenses were further modified in
10 2010. There was a notice of inquiry and a rule making that was
11 started in, I think it was July of 2010.

12 Q. Just a point of clarification, what is an ATC license?

13 A. Oh, I'm sorry. ATC stands for ancillary terrestrial
14 component. It's the terrestrial rights to use the spectrum.

15 Q. And is that a permission that somebody operating a
16 satellite network would need to obtain from the FCC in order to
17 build out a terrestrial network?

18 A. Yes. It was an important permission. Without it
19 satellite spectrum would be limited to satellite use only and
20 you would not have any regulatory approval to use it for a
21 terrestrial-based network. So it was a very important
22 component for the license to be used it for terrestrial
23 services.

24 Q. Okay, now, I'm sorry I interrupted you. You were telling
25 us about an FCC development in July 2010.

LIGHTSQUARED, INC., ET AL.

119

1 A. That's right. So in July 2010, they started a notice of
2 inquiry and a notice of rule making. And the purpose of that
3 was really to update the frequency table of allocations. This
4 is a table that the FCC keeps to determine what uses are a
5 primary use for each and every spectrum band.

6 The purpose of this proceeding was simply to do similar
7 things that LightSquared had achieved, which is update the
8 rules for the spectrum so that it would have coprimary
9 authorization as a terrestrial spectrum, so it would
10 essentially be at equal footing with the satellite
11 authorizations that it had.

12 That started in the middle of 2010, if I recall, and it
13 was resolved with an update to the table sometime in early
14 2011.

15 In 2011, these two companies were in bankruptcy and there
16 was a bid by DISH to buy them out of bankruptcy, successful bid
17 for both of them.

18 Q. Now, at the time that DISH made the bid to buy DBSD and
19 SkyTerra out of -- I'm sorry, TerraStar out of bankruptcy, had
20 they already, both of those companies already received the
21 approval for the construction of the build-out of a terrestrial
22 network?

23 A. Well, they had -- they had the ATC licenses associated
24 with their spectrum. However, there were some more
25 modifications that were asked for when -- as I recall, when

LIGHTSQUARED, INC., ET AL.

120

1 DISH applied for the transfer of the licenses with the FCC --
2 it's a step that the FCC -- that you have to go through to
3 transfer any license. You need approval from the FCC in order
4 to make that happen.

5 Q. And do you recall when, approximately, it was that DISH
6 asked for the approvals for the transfer of those licenses?

7 A. I think that would have been, I think it was the end of
8 the summer of 2011. So August 2011 that they filed for the
9 transfer and control with the FCC.

10 At the same time they had asked for similar conditions or
11 modifications to those licenses to something that LightSquared
12 had asked for and successfully received, which was a waiver of
13 the -- a requirement that every device have a satellite
14 capability.

15 At the time the LightSquared license and TerraStar and
16 DBSD's licenses, the ATC rules did state that every device had
17 to have -- every terrestrial device also needed to have
18 satellite capability. It's something that LightSquared had
19 filed with the FCC in late 2010 to have a waiver of that
20 requirement. It was awarded to us on a conditional basis. So
21 we could have some devices that were terrestrial-only devices.

22 That was -- I believe that or something very similar to it
23 was requested by DISH when they filed for their change of
24 control approval.

25 The FCC did approve the transfer of the licenses. I think

LIGHTSQUARED, INC., ET AL.

121

1 it was in the spring of 2012, maybe April. But they didn't --
2 they didn't make any decisions about the changing the
3 terrestrial rules that were associated with the spectrum.
4 However, what they did was they initiated a new proceeding, a
5 new rule making at the same time, April 2012 that then
6 addressed how the terrestrial rules would be modified.

7 Q. And was there, to your knowledge, a resolution of that
8 rule making process by the FCC at any point later in 2012 or
9 subsequently?

10 A. Yes, there was. There was a decision issued in December
11 of 2012. And that decision essentially removed the requirement
12 to even need an ATC authorization. What it did was it gave it
13 a terrestrial authorization, so it has a standalone terrestrial
14 authorization on that spectrum.

15 Q. And were there any limitations or any peculiarities
16 associated with that FCC approval?

17 A. Well, there were some limitations on the spectrum itself.
18 So throughout the process -- and this will really get into
19 where the spectrum sits in the band in its neighboring
20 spectrum -- so this AWS-4 spectrum that DISH has is immediately
21 adjacent to what we call the H block spectrum.

22 So the H block spectrum is spectrum that's not been
23 allocated yet. It's the subject of, actually it's going to
24 auction very soon. And the downlink component of the H block
25 resides between 1995 megahertz and 2000 megahertz. So it abuts

LIGHTSQUARED, INC., ET AL.

122

1 the DISH spectrum.

2 The important piece here is that that piece of spectrum is
3 downlink spectrum. So the downlink spectrum on the H block is
4 immediately adjacent to the uplink spectrum of DISH's spectrum.
5 That creates some technical concerns and issues that have to be
6 dealt with because whenever you change the use of spectrum,
7 neighboring spectrum from downlink to uplink, there's
8 typically, what you need is some protection, a transition zone
9 of spectrum, commonly referred to as a guard band.

10 So if you're going to have high-power downlink use on
11 spectrum next to low-power uplink use, there could be
12 interference, if you don't provide some transition zone or
13 guard band between them. That's normally done by putting
14 spectrum between the two to isolate the two different uses.

15 Because of that, the FCC had to solve this question,
16 because they wanted to put the H block out to auction and they
17 wanted to sell it for as much as they could. The proceeds from
18 the H block auction will go towards funding a public safety
19 network, FirstNet, for the government. It's a high priority
20 for them.

21 So I believe one of their interests was they wanted to
22 make sure that the H block was protected. In order to protect
23 the H block and make sure there wasn't an interference concern
24 between the H block and the neighboring AWS-4 block, they had
25 to essentially establish a guard band. And the way they did

LIGHTSQUARED, INC., ET AL.

123

1 that was to impose restrictions on the DISH authorization that
2 really impact the first five megahertz of their spectrum. So
3 from 2000 to 2005 megahertz, that spectrum, the way it's been
4 approved, is really not usable.

5 So of their forty megahertz of spectrum, perhaps the
6 easiest way to describe this is they received approval for
7 twenty megahertz of downlink and fifteen megahertz of uplink,
8 to thirty-five megahertz total, not forty, because of this
9 difference between uplink and downlink spectrum and the need
10 for this guard band.

11 Q. Was one of the aspects of the FCC decision in December
12 2012 a requirement that DISH accept in that effective guard
13 band between 2000 and 2005 megahertz any and all interference
14 flowing into there from the H-band, from the H-band downlink?

15 A. Yes, that is correct. And that's really why the spectrum
16 is not usable.

17 Q. Did there come a time when DISH made a proposal to the FCC
18 to try to resolve this problem or this issue that they were
19 having where they had effectively only thirty-five megahertz
20 rather than forty megahertz of usable spectrum?

21 A. Yes, there was.

22 Q. Could you tell the Court what that was.

23 A. Sure. In September of 2013, DISH made a filing that
24 addressed a number of items. There was an agreement on some of
25 the use of their 700 megahertz spectrum that solved some fairly

LIGHTSQUARED, INC., ET AL.

124

1 difficult issues, something that the FCC I would say was very
2 pleased with.

3 They filed that agreement. They also filed or made a
4 commitment that they would -- that DISH would provide the
5 opening bid for the H block auction, somewhere on the order of
6 1.5 billion dollars to start the auction. They would make that
7 commitment.

8 And what they asked for in doing those two things was they
9 asked for approval from the FCC so that they could use all of
10 their AWS-4 spectrum as downlink spectrum.

11 So that was one thing they asked for, make everything
12 downlink spectrum. The second thing they asked for was an
13 extension on some of their build-out requirements on the 700
14 megahertz as well as their AWS-4 spectrum.

15 THE COURT: So by switching the use of the AWS-4 from
16 downlink, it would recapture that five bands and eliminate the
17 need for the guard band between the H block and that block of
18 their AWS-4?

19 THE WITNESS: Yes, Your Honor, you're exactly right.

20 THE COURT: Okay.

21 BY MR. HIRSCHFELD:

22 Q. Now, as a result of that request that was made by DISH to
23 the FCC, the AWS-4 became one hundred percent downlink
24 spectrum, is that correct?

25 A. So, yes, so that was approved, or the FCC approved this

LIGHTSQUARED, INC., ET AL.

125

1 and gave DISH what it was asking for in December of 2013, and
2 yes, that's right. So now they can use all forty megahertz of
3 their spectrum as downlink spectrum.

4 Q. In order to operate a terrestrial wireless network,
5 however, DISH needs uplink spectrum to pair with the downlink,
6 doesn't it?

7 A. Yes, that's correct, they would need uplink spectrum.

8 Q. Now, is there any correlation between LightSquared's
9 spectrum, particularly its uplink spectrum, and the AWS-4 that
10 DISH currently has?

11 A. Yes, there is. I think there's -- it's a very natural
12 pairing of spectrum. So I think the LightSquared spectrum, we
13 have had issues with GPS that have centered around mostly the
14 downlink spectrum we have. Our uplink spectrum is safe to use
15 as uplink spectrum.

16 So if you look at the two bands, the AWS-4 band that DISH
17 has and the LightSquared band, it really makes a lot of sense
18 to put the two together in terms of a pairing that way.

19 So seeing that all of the DISH spectrum is usable for
20 downlink spectrum, it became very obvious why DISH is
21 interested in the LightSquared spectrum.

22 Q. Are you presently aware of any equivalent source of
23 available uplink spectrum that DISH might acquire?

24 A. No, I'm not. It is really -- most spectrum is paired.
25 And as I look at what's happening with spectrum auctions and

LIGHTSQUARED, INC., ET AL.

126

1 other spectrum that's available, I don't see other uplink-only
2 spectrum.

3 Q. Okay. Let me change topics for a moment. Can you look at
4 the binder, the witness binder that you have in front of you,
5 which contains Plaintiff's Exhibit 161? And I would draw your
6 attention specifically to the e-mail from Lucy DeFazio to a
7 number of addressees that begins at the bottom of the first
8 page and continues onto the second page. And do you see that
9 you were listed as a person to whom a copy of this e-mail and
10 the attachments to it were sent?

11 A. Yes, I do.

12 Q. Do you recognize what this e-mail is dealing with and what
13 the attachments are?

14 A. I'm just going to take a minute to review it. I do
15 recognize this, yes.

16 Q. And can you tell the Court what they are?

17 A. Sure. It's -- so it's an e-mail to the board of directors
18 at LightSquared. There is -- attached to it there is an agenda
19 for a board meeting. There is also a memo to the board from
20 our chief financial officer Marc Montagner. And there is a
21 resolution.

22 Q. And what is the subject matter of Mr. Montagner's memo to
23 the board of directors?

24 A. So this is essentially addressing our list of disqualified
25 companies associated with our credit agreement. What we're

LIGHTSQUARED, INC., ET AL.

127

1 doing here is amending the list of disqualified companies.

2 Q. And do you recognize the resolution that is part of the
3 documentation attached to the e-mail?

4 A. Yes, I do.

5 Q. And is that the resolution that was adopted by the board
6 to amend the list of disqualified companies?

7 A. Yes, it is.

8 MR. HIRSCHFELD: At this point, I would move the
9 admission into evidence of Plaintiff's Exhibit 161, Your Honor.

10 THE COURT: Any objections?

11 MR. GIUFFRA: No objection, Your Honor.

12 THE COURT: All right, thank you.

13 (E-mail from Lucy DeFazio to board of directors with agenda
14 attached was hereby received into evidence as Plaintiff's
15 Exhibit 161, as of this date.)

16 Q. Mr. Smith, do you know why LightSquared was amending the
17 disqualified companies list on May 11, 2012?

18 A. Yes, I do. We were amending the list, this is just a few
19 days before we filed for bankruptcy, and here we were simply
20 amending the list to make sure that the list of disqualified
21 companies included all of our competitors, because we didn't
22 want competitors involved in the capital structure. We thought
23 it was important as we were entering bankruptcy to make these
24 updates.

25 Q. Okay. Mr. Smith, did there come a time when you learned

LIGHTSQUARED, INC., ET AL.

128

1 that an entity known as Sound Point or affiliated with Sound
2 Point was purchasing LightSquared's debt?

3 A. Yes, I did.

4 Q. When do you recall becoming aware of that for the first
5 time?

6 A. I believe it was May of 2012 when we had heard that there
7 was a company called Sound Point that had purchased the debt
8 that was held by Icahn.

9 Q. And do you recall approximately how much that debt
10 purchase was?

11 A. It was sizable. I forget the exact number, but it was a
12 sizable position that they had.

13 Q. Do you recall whether there were press accounts relating
14 to that debt purchase at the time?

15 A. You know, I know there were press accounts on many of
16 these things. I frankly forget which ones they were
17 specifically tied to. I think there were press accounts
18 associated with the Icahn sale.

19 Q. At the time you first heard of the sale by Icahn to Sound
20 Point, did you know who it was that was actually behind the
21 Sound Point purchasing who was providing the financing for it?

22 A. No, I did not. I actually never heard of Sound Point
23 prior to that.

24 Q. Did you direct any steps to be taken to try to find out
25 the identity of Sound Point or the persons behind the Sound

LIGHTSQUARED, INC., ET AL.

129

1 Point purchases?

2 A. Yes. I asked folks on my team to find out who was behind
3 it.

4 Q. Who did you ask?

5 A. This would have been Marc Montagner, our chief financial
6 officer, as well as Mark Hootnick from Moelis.

7 Q. And was anybody ever able to report to you in response to
8 that inquiry and that direction from you the identity of the
9 person that was making the purchases through Sound Point?

10 A. No. They tried a number of times and we could never
11 verify who was behind Sound Point. In fact, we didn't have --
12 we didn't know for sure who was behind Sound Point until I
13 think it was almost a year later, May of 2013.

14 Q. And how did you learn who was behind Sound Point in May of
15 2013?

16 A. I had heard it from our legal advisors after there was a
17 hearing, a bankruptcy hearing, in court. So it was disclosed
18 in court.

19 Q. And you learned at that time, did you not, that it was Mr.
20 Ergen that was behind Sound Point?

21 A. Yes, that's correct.

22 Q. And had you ever been told prior to that time that Mr.
23 Ergen was, in fact, the person behind the Sound Point
24 purchases?

25 A. No, never once. There were press accounts and there were

LIGHTSQUARED, INC., ET AL.

130

1 rumors that he may have been behind it. That's some of the --
2 some of what we were trying to verify. We couldn't verify it.

3 Q. Okay, I'd like you to focus on the period between January
4 and June 2013 and ask you if you recall being involved during
5 that period on behalf of LightSquared in efforts to reach a
6 consensual plan of reorganization between LightSquared and its
7 various constituents.

8 A. Yes, I was.

9 Q. What specifically can you recall your role being during
10 that period, that six-month period?

11 A. Sure. Well, during that period we sought to try and reach
12 a consensual agreement so that we could resolve the bankruptcy.
13 We were happy that it was actually mentioned in the exclusivity
14 stipulation that we would work with our lenders, had a
15 requirement to work in good faith with the lenders to see if we
16 could not reach some type of agreement. We thought that was in
17 the best interests of the estate and we were motivated to do
18 that.

19 We struggled, however, to actually have substantive
20 conversations during the period of time. It became very hard
21 and confusing. A lot of the debt trades that were happening
22 created a situation for us where we weren't quite sure who we
23 were -- who we should be negotiating with. Because the amount
24 of debt that was trading hands and at least the reported
25 positions of what we understood Sound Point to be buying

LIGHTSQUARED, INC., ET AL.

131

1 started to grow in a significant fashion to the point that we
2 weren't sure if the ad hoc group of lenders could even carry
3 the class and make a deal with us, make any commitments to us.

4 We -- so it was a difficult time. It was a difficult
5 period for us to even try and get to any kind of term sheet
6 negotiation.

7 Q. And during this time period you're not aware of any major
8 buyer or any substantial buyer of LightSquared debts other than
9 Sound Point, are you?

10 A. No. Sound Point was the only substantial buyer. I think
11 there may have been some small trading that was happening as
12 well, but the only large trades were with Sound Point.

13 Q. Okay. Mr. Smith, are you familiar with the efforts that
14 were made by Jefferies to obtain exit financing for
15 LightSquared during the period that LightSquared had the
16 exclusive right to formulate a plan?

17 A. Yes, I am.

18 Q. What involvement, if any, did you have with Jefferies in
19 connection with that effort?

20 A. So I was involved with the selection process of Jefferies,
21 as we went through a process looking at several banks and
22 ultimately engaged Jefferies; I was involved in that process.
23 I was also involved in the roadshow process that we ran with
24 Jefferies to raise the debt.

25 Q. And what exactly was the roadshow process?

LIGHTSQUARED, INC., ET AL.

132

1 A. So over the course of two to three weeks, we went and met
2 with about fifty accounts of Jefferies' trying to raise money,
3 making a management presentation, and Q and A.

4 Q. When you say we went, are you referring to personnel from
5 Jefferies as well as yourself and others from LightSquared?

6 A. Yes, yes, I am.

7 Q. At any of the roadshow interviews that you had, did you
8 hear any comments from potential financiers or potential lenders
9 with respect to Mr. Ergen's ownership?

10 MR. GIUFFRA: Your Honor, objection. Hearsay.

11 UNIDENTIFIED SPEAKER: It's a yes or no question.

12 THE COURT: Why don't you ask it a different way.

13 Q. Did you have discussions during the roadshow on the
14 subject of Mr. Ergen's ownership?

15 A. There were -- yes. So the roadshow started right in the
16 middle of June, and by this time it was known and confirmed
17 that Mr. Ergen was behind Sound Point's debt purchases.

18 In addition to that, it was also broadly known that Mr.
19 Ergen had made a bid for some of LightSquared's assets. So
20 this was absolutely a topic of discussion at these roadshows.

21 Q. Can you recall any of the specifics of the discussion?

22 A. Yes, actually there were --

23 THE COURT: Go ahead.

24 MR. GIUFFRA: Your Honor, same hearsay objection.

25 THE COURT: All right, Mr. Hirschfeld?

LIGHTSQUARED, INC., ET AL.

133

1 MR. HIRSCHFELD: Your Honor, I'm not offering it for
2 the truth -- I'm not offering it for the truth of whatever the
3 statements were.

4 THE COURT: What are you offering it for?

5 MR. HIRSCHFELD: Just so that Your Honor can
6 appreciate what it was that the personnel from Jefferies and
7 from LightSquared were encountering during the roadshow.
8 Whether that was, in fact, whether the comments were, in fact,
9 truthful statements by the perspective lenders is not what I'm
10 offering it for.

11 MR. GIUFFRA: Your Honor --

12 THE COURT: Mr. Giuffra?

13 MR. GIUFFRA: -- if they like --

14 THE COURT: Speak into your microphone so we can
15 record you.

16 MR. GIUFFRA: Oh, I apologize. Yeah. If they wanted
17 to bring in the bankers and have the bankers say what the
18 bankers were saying, that's one thing.

19 THE COURT: Well, if they wanted to bring in the
20 bankers to actually demonstrate that that is actually what the
21 bankers believed, they'd have to bring in the bankers. But I
22 think that we have Mr. Smith at meetings and we have Mr. Smith
23 being asked what he was told. And as long as it's not being
24 offered for the truth, that that's, in fact, in essence what
25 the bankers believed and what the cause was of the lack of

LIGHTSQUARED, INC., ET AL.

134

1 ability to get the financing, then I think it comes in for that
2 limited purpose.

3 MR. GIUFFRA: Thank you, Your Honor.

4 THE COURT: All right.

5 BY MR. HIRSCHFELD:

6 Q. Do you need to have the question read back?

7 A. No, I think I'm fine.

8 So one of the common statements that we came up against
9 during this fundraising was why should I, why should we waste
10 our time with this; doesn't Charlie have this all sewn up. He
11 has a blocking position in your debt. He hasn't offered to buy
12 the company. Why -- you know, doesn't he have you guys kind of
13 boxed in? And why, you know, why should we really pursue this?

14 Q. Did you hear that kind of comment more than once during
15 the roadshows?

16 A. We heard it many, many times. It was -- it was a very
17 common discussion.

18 Q. And was that comment or the frequency of those comments a
19 source of disappointment or frustration for LightSquared and
20 its bankers?

21 A. It absolutely was.

22 Q. Did you also have communications during this time period
23 with strategics who might be interested in making a strategic
24 investment or acquisition with respect to LightSquared or its
25 spectrum?

LIGHTSQUARED, INC., ET AL.

135

1 A. Yes, we did.

2 Q. And who was it that participated in those discussions with
3 the strategics, if you recall? Was that Jefferies that was
4 participating or someone else?

5 A. No. This was not part of the Jefferies fundraising. So
6 this was LightSquared management and Moelis, our financial
7 advisor.

8 Q. And did the topic of Mr. Ergen's ownership of LightSquared
9 debt and his offer through LBAC to purchase certain spectrum
10 come up during the meetings that you had with his strategics?

11 THE COURT: Mr. Giuffra?

12 MR. GIUFFRA: Objection, Your Honor. This is becoming
13 pretty clear that he's trying to introduce hearsay evidence.
14 It's not even clear what the witness heard as opposed to what
15 Moelis heard or someone else in the company.

16 THE COURT: Well, we're only going to hear what the
17 witness heard. We're not going to have double layers.

18 Mr. Friedman, do you have something to say?

19 MR. FRIEDMAN: Yes, Your Honor. I think that the
20 state of mind of market participants with regard to
21 LightSquared is not hearsay. It's the state of mind of a
22 mental condition of a participant. It's not hearsay. It's
23 803.3. Then-existing mental state of mind of somebody on the
24 other side of a transaction.

25 MR. GIUFFRA: Your Honor, it's the state of mind of

LIGHTSQUARED, INC., ET AL.

136

1 the witness. That's basic rules of evidence of hearsay.

2 THE COURT: I think --

3 MR. FRIEDMAN: No.

4 THE COURT: Mr. Friedman, he's right.

5 MR. FRIEDMAN: I'm not going to argue.

6 THE COURT: But I think that what's occurring here,
7 which is not going to be any great surprise to me is that we
8 have Mr. Smith who attended the series of meetings and we're
9 trying to get a sense of what occurred and what he heard. And
10 I think that I'm interested in hearing that. It is not coming
11 in, in my mind, for the truth of what is being asserted. He's
12 telling me what he heard.

13 MR. GIUFFRA: Your Honor, just one request, if
14 counsel could be --

15 THE COURT: You can have a continuing objection; is
16 that your request?

17 MR. GIUFFRA: No, it's a much more specific one, that
18 he just to be clear as to what he heard as opposed to the
19 double --

20 THE COURT: That --

21 MR. FRIEDMAN: -- the double hearsay problem is what
22 I'm concerned over.

23 THE COURT: You are exactly right on that. So we're
24 going to limit the questions, or please ask the questions so
25 that we get what Mr. Smith heard and not what somebody else --

LIGHTSQUARED, INC., ET AL.

137

1 were his report of what someone else may have heard.

2 MR. HIRSCHFELD: Right, and that's what I had intended
3 to ask, Your Honor.

4 THE COURT: Okay.

5 MR. HIRSCHFELD: If I phrased it infelicitously, it's
6 my fault.

7 THE COURT: All right.

8 BY MR. HIRSCHFELD:

9 Q. Mr. Smith, could you tell us, at these meetings that you
10 and others from the company and Moelis had with the strategics,
11 what you heard on the subject of Mr. Ergen's ownership of the
12 debt and Mr. Ergen's sponsorship of the LBAC bid?

13 A. Sure, and if I create any confusion, I was at -- in
14 person, I was present at all fifty meetings with the Jefferies
15 roadshow. I was also in person at the four meetings with the
16 strategic wireless operators.

17 Q. Okay. So tell the Court what you heard during the
18 meetings with the strategics on that subject.

19 A. Lots of things. But there was one, there was also a very
20 similar thread when it came to the involvement of Mr. Ergen,
21 which was very -- almost the same thing that the potential
22 investors were saying, which is how can we get involved in this
23 because we were, with the strategics, offering, really
24 proposing that they make some type of investment in
25 LightSquared to help us with the reorganization plan that would

LIGHTSQUARED, INC., ET AL.

138

1 benefit them in the long run, meaning they could get access to
2 the spectrum in some way, essentially almost have an option to
3 the spectrum once it was approved because FCC approval was
4 obviously a very great concern for them. We were trying to
5 pitch them on there is a low-cost option that you could
6 actually get yourself some advantage to having access to the
7 spectrum once it was approved.

8 The response was similar, which was, but is that really
9 going to work; why should we get involved where it looks
10 like -- it looks like -- it was almost a foregone conclusion
11 how this will resolve itself, again speaking specifically to
12 the blocking position that Mr. Ergen had and the offer that he
13 had made.

14 MR. HIRSCHFELD: Your Honor, that concludes the direct
15 examination.

16 THE COURT: All right. Thank you. Cross-examination?

17 MR. BARR: Your Honor, just for housekeeping,
18 before --

19 THE COURT: Yes.

20 MR. BARR: You may remember that we have potential
21 confidentiality issues. I don't know where the cross-exam is
22 going.

23 THE COURT: All right.

24 MR. BARR: I apologize now for jumping up --

25 THE COURT: That's fine.

LIGHTSQUARED, INC., ET AL.

139

1 MR. BARR: -- if it's going into that area.

2 THE COURT: It's one area where I always want people
3 to jump up. Why don't you take a moment to confer with counsel
4 and make sure that you have a clear understanding of the
5 parameters of that.

6 (Pause)

7 MR. FREIMUTH: Your Honor, can I approach?

8 THE COURT: Please.

9 MR. FREIMUTH: I don't know that I'm going to use them
10 all, but --

11 THE COURT: Okay.

12 Mr. Smith, if you need a break at any point, please
13 just let us know.

14 THE WITNESS: Okay, thank you.

15 THE COURT: All right?

16 THE WITNESS: I'm fine.

17 MR. FREIMUTH: Matthew Freimuth, Your Honor, from
18 Willkie Farr, for SPSO and Mr. Ergen.

19 CROSS-EXAMINATION

20 BY MR. FREIMUTH:

21 Q. Good afternoon, Mr. Smith.

22 A. Good afternoon.

23 Q. It's nice to see you again.

24 A. You to.

25 Q. We met a couple of days ago, correct, at your deposition?

LIGHTSQUARED, INC., ET AL.

140

1 A. That's correct.

2 Q. Okay. I just want to ask you a couple follow-up
3 questions.

4 Mr. Hirschfeld asked you about the time period in early
5 2013 where LightSquared was having negotiations with strategics
6 and discussing exit financing?

7 A. That's correct.

8 Q. You recall that? Okay. I'd like to start with your
9 discussions with strategics. During the bankruptcy period and
10 during that time frame there came a time where LightSquared
11 reached out to four major wireless carriers, correct?

12 A. That's correct.

13 Q. And those four carriers were Sprint, correct?

14 A. That's correct.

15 Q. AT&T?

16 A. That's correct.

17 Q. T-Mobile?

18 A. Yes.

19 Q. Verizon?

20 A. That's right.

21 Q. Okay. And when you met with AT&T, LightSquared proposed a
22 specific type of strategic partnership that I believe you
23 called the low-cost option?

24 A. You know, I'd like to, if I -- maybe I could describe it
25 in more general terms just because I know this is public and

LIGHTSQUARED, INC., ET AL.

141

1 I'm sensitive to revealing specific discussion points with each
2 of these companies, just to maintain our relationship with
3 them.

4 However, we did, I can speak to the low-cost option, I
5 think, to answer your question, which is that we made the same
6 proposal to each of the wireless companies that we met with,
7 which was a low-cost option, as we were calling it.

8 Q. And you did refer to that as the low-cost option, correct?

9 A. Yes.

10 Q. Okay. And when you made that presentation to AT&T, one
11 aspect of the low-cost option was that you were asking AT&T to
12 consider making an equity investment in LightSquared, correct?

13 A. Correct.

14 Q. And in exchange for that equity investment, you would give
15 them a preference to use LightSquared spectrum once it was
16 approved by the FCC, correct?

17 A. We weren't that -- we weren't that specific. But the
18 nature of the construct that we had in mind was for an equity
19 investment we could reach some agreement that could essentially
20 give whoever took us up on this an option to have access to the
21 spectrum in some type of form or fashion. We never got to any
22 details in terms of what that looked like.

23 Q. And when you met with Sprint, you proposed appear similar
24 low-cost option, correct?

25 A. We proposed a similar option to all of the wireless

LIGHTSQUARED, INC., ET AL.

142

1 carriers that we met with.

2 Q. Okay. And when you discussed the low-cost option with
3 Sprint, you were talking about an equity investment in the
4 ballpark of about 500 million dollars, correct?

5 A. That's correct, with each of them actually.

6 Q. Okay. And the low-cost option that we've been discussing
7 was the only real proposal that LightSquared made when it met
8 with each of these four wireless carriers, correct?

9 A. That was our proposal and we also were very open with them
10 to say if they had other ideas, we were certainly open to
11 anything.

12 Q. But LightSquared made no other specific proposals?

13 A. This was our specific proposal and only specific proposal,
14 yes.

15 Q. And you reported on at least some of these conversations
16 to the LightSquared board of directors, correct?

17 A. Yes, that's right.

18 Q. Okay. And you did so about July 1, 2013, does that sound
19 right?

20 A. That sounds right.

21 MR. FREIMUTH: Okay. Can we ask the witness to take a
22 look at what I think is in his binder as Plaintiff's Exhibit
23 679, and Your Honor as well.

24 Q. Are you there, Mr. Smith?

25 A. Yes, I am.

LIGHTSQUARED, INC., ET AL.

143

1 Q. Okay. And these are minutes from a LightSquared July 1,
2 2013 board meeting, correct?

3 A Correct.

4 Q. You were there?

5 A. I was there, yes.

6 Q. Okay. And these appear to be an accurate copy of the
7 exhibits or -- sorry, of the minutes that were recorded at that
8 meeting?

9 A. Yes, these appear to be the minutes recorded at that
10 meeting, yes.

11 MR. FREIMUTH: I would move their admission into
12 evidence.

13 THE COURT: Any objection?

14 MR. HIRSCHFELD: No objection.

15 THE COURT: All right.

16 (Minutes from a LightSquared July 1, 2013 board meeting was
17 hereby received into evidence as Plaintiff's Exhibit 679, as of
18 this date.)

19 Q. And Mr. Smith, I'd like you to turn to page 3 of the
20 minutes, which is at the Bates number ending 935?

21 A. Okay, I'm there.

22 Q. And you see in the minutes the second paragraph that
23 appears on the page?

24 A. I see that.

25 Q. And there is a sentence that reads "Mr. Smith noted that

LIGHTSQUARED, INC., ET AL.

144

1 there was some interest" -- sorry, excuse me. This discussion
2 relates to your reporting to the board about your meetings with
3 at least three of the four wireless carriers, correct?

4 A. Correct.

5 Q. Okay. And you see the sentence that reads "Mr. Smith
6 noted that there was some interest, but each of the operators
7 had expressed a common view that they might be interested in a
8 strategic partnership, but only after the conclusion of an FCC
9 approval process," correct?

10 A. That's correct.

11 Q. And that was your report to the board?

12 A. That was my report.

13 Q. And you believed that LightSquared endeavors to be
14 accurate and truthful when it records board minutes?

15 A. Yes.

16 Q. Okay. And at the time that you were having these
17 discussions with these four wireless carriers, the FCC approval
18 process with respect to LightSquared's requests to use its
19 spectrum for terrestrial use had not been resolved, correct?

20 A. That's correct.

21 Q. And in fact it's not resolved today, correct?

22 A. That is correct.

23 Q. Okay. And do you see anywhere in these minutes reflected
24 a discussion about Mr. Ergen in connection with LightSquared's
25 conversations with these strategics?

LIGHTSQUARED, INC., ET AL.

145

1 A. I don't see that here, but there are many redacted
2 sections of the minutes.

3 Q. Do you understand that those redacted sections is because
4 your counsel is claiming they're privileged?

5 A. Yes.

6 Q. You also testified about efforts that LightSquared made in
7 this early 2013 time frame regarding obtaining exit financing,
8 correct?

9 A. Yes, that's correct.

10 Q. Okay. And LightSquared reached out to a number of banks
11 that could help it with those refinancing efforts during that
12 time frame, correct?

13 A. That's correct.

14 Q. And you, yourself, met with a few of those banks?

15 A. Yes.

16 Q. And do you recall a discussion at the April 8th, 2013
17 LightSquared board meeting about discussions with banks about
18 securing exit financing?

19 A. You said April 8th?

20 Q. April 8th, 2013.

21 A. I don't recall. Is there something I could look at that
22 could help me?

23 Q. Sure, ask you to turn your attention to Plaintiff's
24 Exhibit 443. Do you see that?

25 A. Yes, I do.

LIGHTSQUARED, INC., ET AL.

146

1 Q. Okay. Exhibit 443 appears to be board meeting minutes
2 from the April 18, 2013 meeting on the LightSquared board,
3 correct?

4 A. Yes.

5 Q. And you were present at that meeting?

6 A. I was present at that meeting, yes.

7 Q. And this document appears to be an accurate copy of the
8 minutes that were recorded at that meeting?

9 A. I would assume so. I haven't reviewed it, but as you
10 pointed out we strive to make our meeting minutes accurate.

11 MR. FREIMUTH: Okay. I'd like to move this exhibit
12 into evidence.

13 THE COURT: Let me, as a housekeeping matter, and to
14 keep the flow going, let's agree that at the end, that you
15 folks are going to keep track of everything that's offered and
16 at the end you're going to tell me if there are any objections
17 admissibility, but we're going to assume that everything that
18 you ask the witness about you're going to offer in. That way
19 we can just keep going.

20 MR. FREIMUTH: Sounds like a great plan to me, Your
21 Honor.

22 THE COURT: Any problems anyone? Okay.

23 BY MR. FREIMUTH:

24 Q. And I'd like to focus your attention on the top paragraph
25 on page 3. It reads, "Mr. Montagner reported that the company

LIGHTSQUARED, INC., ET AL.

147

1 had started discussions with a number of banks about
2 refinancing the company's debt." Those are the discussions
3 that we've been just talking about?

4 A. Correct.

5 Q. Okay. And the minutes go on to state, "While these
6 discussions are still preliminary in nature, most of the banks
7 had indicated that the company will need to have substantial
8 clarity on regulatory status for its request of a license
9 modification to ensure best possible execution."

10 A. I see that. That's correct.

11 Q. And that was Mr. Montagner's report to the board?

12 A. Yes, it was.

13 Q. Okay. And at the time, you viewed LightSquared's pending
14 applications as important to the possibility of refinancing
15 LightSquared's debt, correct?

16 A. Yes.

17 Q. And at the time those applications were not approved,
18 correct?

19 A. That is correct.

20 Q. And it remains the fact today that they're not approved,
21 correct?

22 A. That is correct.

23 Q. You also talked about some discussions that LightSquared
24 was having with the ad hoc group of secured creditors. Do you
25 recall that?

LIGHTSQUARED, INC., ET AL.

148

1 A. Yes.

2 Q. Okay. And I'd like to turn your attention to exhibit
3 Defendant's 340, which is also in your binder. Do you see
4 that?

5 A. Is that D-340?

6 Q. D-340, yes.

7 A. Yes, I see it.

8 Q. And that is an e-mail you sent to Mr. Phil Falcone on May
9 18th, 2013, correct?

10 A. That's correct.

11 Q. Okay. And the e-mail discusses negotiations that
12 LightSquared and Harbinger were having with the ad hoc group of
13 secured creditors, correct?

14 A. Yes, that's correct.

15 Q. Okay. And I'd like to call your attention to the last
16 sentence in the first paragraph. You say you view getting to a
17 deal on their term sheet a very low probability. Do you see
18 that?

19 A. I see that, yes.

20 Q. And that is what you wrote to Mr. Falcone on May 18th,
21 2013, correct?

22 A. That is correct.

23 Q. And you viewed the probability of getting to an agreement
24 with the ad hoc group of secured creditors below probability in
25 part because they were asking for a very significant amount of

LIGHTSQUARED, INC., ET AL.

149

1 equity, correct?

2 A. That was part of it, yes.

3 Q. In part, because they were not willing to reduce their
4 debt substantially, correct?

5 A. Correct.

6 Q. In part, because they were asking Harbinger for additional
7 500 million dollars in equity, correct?

8 A. Correct.

9 Q. And in part, because they were seeking changes to
10 LightSquared's governance, correct?

11 A. I believe that was part of the term sheet that is sent,
12 yes.

13 Q. You testified at the start of today about DISH's AWS-4
14 spectrum, correct?

15 A. Yes, I did.

16 Q. And it's true that the FCC approved recently all forty of
17 the AWS-4 spectrum for downlink?

18 A. That's true.

19 Q. And that happened in December of 2013?

20 A. Yes.

21 Q. And the application by DISH was made in September of 2013,
22 correct?

23 A. That's correct.

24 MR. FREIMUTH: I don't have anything further, Your
25 Honor.

LIGHTSQUARED, INC., ET AL.

150

1 MR. GIUFFRA: Just a couple of questions, Your Honor.

2 THE COURT: All right.

3 CROSS-EXAMINATION

4 BY MR. GIUFFRA:

5 Q. Hi, Mr. Smith. Robert Giuffra. I'm representing DISH and
6 EchoStar. We haven't actually met before. Just a handful of
7 questions.

8 You had no role in negotiation or drafting of the credit
9 agreement between LightSquared and its lenders, dated October
10 1, 2010, isn't that right?

11 A. That's correct.

12 Q. And you know nothing about that drafting history, right?

13 A. I'm sorry, could you repeat?

14 MR. GIUFFRA: I'll withdraw the question.

15 Q. Now, Mr. Phil Falcone is a member of your board of
16 directors, right?

17 A. That's correct.

18 Q. And you've had a number of conversations with Mr. Falcone
19 since becoming the CEO of LightSquared, right?

20 A. I have.

21 Q. When was the last time you spoke to Mr. Falcone?

22 A. A couple of days ago.

23 Q. Did you speak to him about the fact that you'd be
24 testifying here today?

25 A. Actually no, we didn't.

LIGHTSQUARED, INC., ET AL.

151

1 Q. Okay, but you've spoken to him about the fact that this
2 litigation is occurring, right?

3 A. I'm actually -- we may have. I did not speak to him about
4 the litigation a couple of days ago.

5 Q. You've never spoken to Mr. Falcone about this litigation
6 ever?

7 A. I didn't say that. I said when we spoke a couple of days
8 ago, I didn't speak to him about this litigation.

9 Q. Have you ever spoken to Mr. Falcone about this litigation?

10 A. I'm sure we have. We've discussed this at board meetings.

11 Q. And have you ever spoken to lawyers at Kasowitz Benson
12 about this litigation?

13 A. I'm not sure that I have. I know our lawyers have. I've
14 spoken to my lawyers about this litigation.

15 Q. Now, Mr. Falcone and his firm, Harbinger, owns a
16 substantial percentage of the equity in LightSquared, right?

17 A. Yes, that's right.

18 Q. And has Mr. Falcone discussed with you over the past
19 several years as you were heading into bankruptcy the fact that
20 he'd like Harbinger to keep as much of that equity as he
21 possibly can?

22 A. Yes. I mean obviously Mr. Falcone wants to recover as
23 much of his investment as he can. I think -- I'm sure he's
24 said things like that.

25 Q. And has maintaining his equity been an overriding

LIGHTSQUARED, INC., ET AL.

152

1 objective of Mr. Falcone in the course of the last several
2 years?

3 A. Maintaining his equity?

4 Q. The Harbinger's equity in LightSquared.

5 A. Could you be more specific? You mean all of it or some of
6 it?

7 Q. As much of it as he possibly can keep.

8 A. Sure, I think that's it's natural. He'd like to keep as
9 much of it as he can. But he's been -- I've also seen that
10 he's been very willing to negotiate and make concessions on
11 this to try and get to a consensual resolution. That's been a
12 consistent theme of his since actually before we filed for
13 bankruptcy.

14 Q. Isn't it a fact that the vast majority of the members of
15 your board are affiliated with Harbinger?

16 A. Vast majority?

17 Q. Yeah.

18 A. They have a majority. I would not call it a vast
19 majority.

20 Q. But they have a majority of the directorships, right?

21 A. There are eleven directors. Six of those are associated
22 with Harbinger; five of those are not.

23 Q. And Mr. Falcone was involved in the hiring of yourself as
24 CEO, right? He approved that decision?

25 A. Yes.

LIGHTSQUARED, INC., ET AL.

153

1 Q. Now, you testified before that in May 2013 you had no idea
2 who Sound Point was. Do you remember that testimony?

3 A. It was -- right, it was the first time I heard of Sound
4 Point.

5 Q. Okay, I'd like to show you a document that's been marked
6 as Defendant's Trial Exhibit 36. Now, in or about May 2006,
7 were you aware that Mr. Falcone was writing e-mails to various
8 persons saying that he thought that --

9 THE COURT: You misspoke; you said May of 2006 and you
10 meant May of 2012.

11 MR. GIUFFRA: 2012. It's been a long day, Your Honor.

12 BY MR. GIUFFRA:

13 Q. -- May of 2012, that he thought that Mr. Ergen was buying
14 LightSquared debt?

15 A. I'm sorry, could you repeat the question?

16 Q. In or about May 2012, did Mr. Falcone ever say to you that
17 he thought that Mr. Ergen was buying LightSquared debt, yes or
18 no?

19 A. There was speculation at the time that it could be Mr.
20 Ergen. So I assume yes, Mr. Falcone would have said that. But
21 there were also others that he suspected might have been behind
22 Sound Point. It was not only Mr. Ergen.

23 Q. My question was yes or no. Did Mr. Falcone ever say to
24 you I think that Mr. Ergen is buying LightSquared debt --

25 THE COURT: Mr. Giuffra, I'm going to get admonished

LIGHTSQUARED, INC., ET AL.

154

1 by the court reporter to keep you by the microphone.

2 MR. GIUFFRA: I'm sorry, Your Honor.

3 THE COURT: All right?

4 MR. GIUFFRA: Okay.

5 A. Could you repeat the question?

6 Q. Did Mr. Falcone, in or about May 2012, ever say to you
7 that he believed that Mr. Ergen was buying LightSquared debt,
8 yes or no?

9 A. I don't remember specifically. I assume he would have
10 said something along those lines, as he said it about others as
11 well.

12 Q. Now, this e-mail that I've handed you, Defendant's Trial
13 Exhibit 36, have you ever seen this e-mail before?

14 A. I don't think I have. I'm reviewing it.

15 Q. Were you aware that in May 2012, Mr. Falcone was telling
16 Reuters definitively, with no limitation whatsoever, that Mr.
17 Ergen was buying LightSquared debt?

18 A. No, I don't believe I was aware of that.

19 MR. GIUFFRA: No further questions.

20 THE COURT: Thank you.

21 Any redirect?

22 MR. HIRSCHFELD: One question, Your Honor.

23 REDIRECT EXAMINATION

24 BY MR. HIRSCHFELD:

25 Q. Mr. Smith, if you would look again in the volume of

LIGHTSQUARED, INC., ET AL.

155

1 exhibits that the defendants gave you, the document that is
2 Plaintiff's Exhibit 443. And look at the second page of that
3 document. Do you see in the second paragraph that appears on
4 that page, the last sentence of the paragraph reads, "Mr.
5 Hootnick reported that Moelis had a meeting with Sound Point,
6 but it would not disclose its investors or beneficial owners.
7 He also noted that the company had met with Providence,
8 Fortress and MAST to explore ideas about cooperating on a plan
9 of reorganization, but that further discussions were halted
10 after Sound Point agreed to purchase the LP preferred stock
11 from these three investors." Do you see that language?

12 A. Yes, I see that.

13 Q. Is that an accurate reporting of the statements that were
14 made by Mr. Hootnick?

15 A. Yes, I believe that to be accurate.

16 MR. HIRSCHFELD: Thank you. I have nothing further.

17 THE COURT: All right. Thank you, Mr. Smith. You're
18 excused.

19 THE WITNESS: Thank you, Your Honor.

20 THE COURT: Yes.

21 MR. MUNDIYA: I don't see Mr. Stone in the courtroom
22 but --

23 THE COURT: I don't either.

24 MR. MUNDIYA: -- but we --

25 UNIDENTIFIED SPEAKER: He's across the hall.

LIGHTSQUARED, INC., ET AL.

156

1 THE COURT: Should we take a -- do you want to take a
2 five-minute break?

3 MR. FRIEDMAN: We're gonna get him. Take --

4 THE COURT: Do you want to take a five-minute break?

5 MR. MUNDIYA: That would be -- please, Your Honor.

6 THE COURT: All right.

7 MR. MUNDIYA: We may have a scheduling issue.

8 THE COURT: Okay.

9 MR. MUNDIYA: Which I think that the next witness is
10 going to be a short one.

11 THE COURT: Okay.

12 MR. MUNDIYA: And I think the cross is going to be
13 reasonably short, and then the next witness I understand is Mr.
14 Kiser. Mr. Kiser is not here. We were led to believe that
15 these two witnesses would take the balance of the afternoon and
16 Mr. Kiser would testify tomorrow morning.

17 THE COURT: That's fine.

18 MR. MUNDIYA: Okay, thank you.

19 THE COURT: Okay, we'll come back in five minutes,
20 then.

21 MR. MUNDIYA: Thank you.

22 (Recess from 2:55 p.m. until 3:07 p.m.)

23 THE CLERK: All rise.

24 THE COURT: Please have a seat.

25 All right. Mr. Stone.

LIGHTSQUARED, INC., ET AL.

157

1 MR. STONE: Yes, Your Honor, the plaintiffs call
2 William Derrough.

3 THE COURT: Good afternoon, Mr. Derrough. Would you
4 raise your right hand, please?

5 (Witness sworn)

6 THE COURT: Thank you. Please have a seat.

7 VOIR DIRE EXAMINATION

8 BY MR. STONE:

9 Q. Mr. Derrough, by whom are you employed?

10 A. Moelis & Company.

11 Q. And how long have you been at Moelis?

12 A. Five and a half years.

13 Q. What's your position at Moelis?

14 A. Managing director and global co-head of recapitalization
15 and restructuring.

16 Q. What are your duties as managing director and co-head of
17 the recapitalization and restructuring group?

18 A. It's sort of principally two areas, one being managerial
19 running the group or co-leading the group with Thane Carlston
20 and all the duties around that, you know, staffing,
21 supervising, things like that, and then actively leading
22 restructuring assignments.

23 Q. Can you briefly walk the Court through your employment
24 history before coming to Moelis?

25 A. Sure. I started my career in banking at Solomon Brothers

LIGHTSQUARED, INC., ET AL.

158

1 in Los Angeles in the late '80s.

2 Then was at Chanin & Company in Los Angeles for about
3 seven years. Where Solomon was general investment banking
4 corporate finance, Chanin was a firm focused on restructurings
5 and distressed companies.

6 I spent a year at a private equity firm focused on buying
7 stressed companies.

8 Then in 1998 joined Jefferies to start a restructuring
9 group there. I was there for ten years. I co-led the group
10 with Thane, and joined Moelis in July of 2008.

11 Q. During the ten years you were at Jefferies, were you on
12 any committees there?

13 A. Yes, I was.

14 Q. And what committees were those?

15 A. So I was on a number of the firm's oversight and
16 management committees. I was on the investment banking
17 management committee, the fairness opinion committee, the
18 valuation committee, the marketing committee.

19 Q. Have you testified as an expert witness at trial or
20 arbitration proceedings before?

21 A. I have.

22 Q. And how many times?

23 A. You mean live testimony?

24 Q. Yes.

25 A. More than ten times, maybe more than twenty times.

LIGHTSQUARED, INC., ET AL.

159

1 Q. And how many of those were in bankruptcy proceedings?

2 A. I think -- I think all of them in terms of live testimony.

3 Q. And in what the subject matters has a court qualified you
4 to testify as an expert?

5 A. I've testified as an expert on matters of valuation, on
6 matters of financing, capital markets. I know I testified with
7 respect to distressed M&A processes in several cases. I can't
8 recall specifically whether we went through the expert
9 qualification process or not. I believe we did in Globalstar,
10 but I can't remember specifically.

11 Q. In how many bankruptcy sales processes have you been
12 involved with?

13 A. Dozens and dozens.

14 Q. And how many out-of-court sales processes have you been
15 involved with?

16 A. Probably -- certainly more than twenty.

17 Q. And what type of companies or industries did those sales
18 processes involve?

19 A. It really runs the gamut. I would generally say probably
20 almost every industry from, you know, real estate to
21 healthcare, to airlines, retail companies, telecom companies,
22 satellite companies.

23 Q. And in those sales processes in which you've been
24 involved, have you represented bidders?

25 A. Yes.

LIGHTSQUARED, INC., ET AL.

160

1 Q. Have you at times represented targets?

2 A. Yes.

3 Q. And have you represented other interested parties in
4 auctions?

5 A. Yes. And just, you say auctions, broadly --

6 Q. Sales processes?

7 A. Processes that may be auctions, or sale processes --

8 Q. Right.

9 A. -- or otherwise resulting in the change and control.

10 MR. STONE: Your Honor, at this time I'd like to
11 proffer Mr. Derrough as an expert in distressed M&A.

12 MR. FRAWLEY: Your Honor, I don't think we have a
13 fundamental objection to the expertise of Mr. Derrough. We do
14 think that the topic of his testimony does not fit within that
15 expertise and is going to wander into pseudo-factual testimony
16 about absent third parties' mental states. So we have an
17 objection to the nature of the testimony --

18 THE COURT: I'm sorry, could you say that again a
19 little more loudly?

20 MR. FRAWLEY: Our understanding is that Mr. Derrough
21 was going to testify as to the subjective perceptions of
22 putative bidders in this process here, which we don't think
23 fits within the expertise of any person. So we don't have any
24 objection to Mr. Derrough's expertise as a restructuring
25 expert, but we don't think that expertise has an application to

LIGHTSQUARED, INC., ET AL.

161

1 the testimony we're going to hear today.

2 THE COURT: All right. So I'm going to qualify him as
3 an expert and we're going to see what happens.

4 Go ahead.

5 DIRECT EXAMINATION

6 BY MR. STONE:

7 Q. Mr. Derrough, on what matters were you asked to testify
8 today?

9 A. The topic that I've been asked to testify is -- involves
10 issues around a competitor or a strategic bidder acquiring a
11 blocking position or a significant amount of debt in a
12 company's capital structure.

13 Q. And what opinions did you reach with respect to that
14 subject matter?

15 A. It's my opinion that when a strategic buyer or competitor
16 does something like that, meaning buys a blocking position, or
17 a substantially significant position of the company's capital
18 structure, it most often results in some type of chilling of a
19 sale process or otherwise dissuading bidders from, potential
20 bidders, from wanting to participate.

21 Q. And on what do you base your opinion?

22 A. I've been in and around, run sale processes or similar
23 types of transactions in the distressed arena since 1991. My
24 principal job in those activities is trying to induce bidders
25 to show up and bid, doing whatever we can without lying or

LIGHTSQUARED, INC., ET AL.

162

1 breaking the law to try to convince people to get in. And so
2 based on my, you know, more than two decades of experience.

3 Q. Can you explain generally what it means to have a blocking
4 position in a company's debt?

5 A. A blocking position I think to most bankruptcy
6 practitioners means owning at least one-third of a class in a
7 company's capital structure.

8 Q. Can you explain generally --

9 A. So one-third in dollar amount of a class.

10 Q. Can you explain what you mean by a company having a
11 position of significant influence in a company's debt?

12 A. So that would be less than a blocking position. It's a
13 little bit of, you know, in the eye of the beholder, but
14 something like twenty, twenty-five percent of a company's -- or
15 of a class could still have the same kind of influence in the
16 outcome of a case, and so it would be I consider it very
17 significant and reviewed by potential bidders as being a
18 significant player.

19 Q. What effect, if any, does it have on a sales process if
20 someone has a blocking position or a position of significant
21 influence?

22 A. Well, from a bidder's perspective, the decision to get
23 into an auction process or a sale process in bankruptcy is not
24 an easy one. There are reputational issues and PR issues and
25 things like that. There's also cost issues. A decision to

LIGHTSQUARED, INC., ET AL.

163

1 enter into that means you probably need to hire a lawyer at a
2 minimum or a law firm, you need to hire probably a banker, an
3 accounting firm, spend a lot of money, put a lot of time and
4 effort into it.

5 And in my experience, potential bidders generally only go
6 to those efforts if they believe that there is a legitimate
7 opportunity or chance of winning in a process, the so-called
8 level-playing-field issue, also being convinced that there is,
9 you know, a willing seller at the end of the day.

10 And so in the case of a competitor or a strategic buyer
11 owning this type of position and capital structure, it becomes
12 harder and harder for a potential strategic buyer to convince
13 themselves that there is a level playing field or a real shot
14 at owning it or winning.

15 Q. Why, when you have a strategic bidder sitting with a
16 blocking position or a position of significant influence, is it
17 particularly difficult for other bidders?

18 A. Well, the general presumption is that that strategic
19 bidder has done that in order to ultimately own a hundred
20 percent of the company. So as contrasted with maybe a
21 financial investor where they're really looking for financial
22 return and in many times are looking for a strategic to
23 ultimately take them out, the general assumption is that
24 strategic got in there to own the company, to own the assets.

25 And so from the outside, XYZ potential bidder would want

LIGHTSQUARED, INC., ET AL.

164

1 to take a look at it and they hired one of the law firms in
2 this room to take a look at it, they would most likely be told,
3 well, you know, this other party who is already in the capital
4 structure has the ability to drive a plan process potentially,
5 has the ability to go to court as a true party-in-interest and
6 get things changed, auctions processes changed, auctions
7 canceled.

8 And so it tends to afford that bidder who's inside the
9 capital structure significant actual influence, but in many
10 ways even greater perceived influence in the ultimate outcome.

11 It's sort of generally hard enough, and I think this Court
12 knows, you know, trying to convince people to show up into
13 auctions and making sure they believe that there is going to be
14 a fair process and level playing field, the average bidder is
15 not always, you know, familiar with the bankruptcy process.

16 Something like this just adds a whole nother layer of
17 complexity and, therefore, doubt in the mind of a potential
18 bidder.

19 Q. What effect, if any, does it have on bidders if the
20 strategic bidder who has a blocking position or a position of
21 significant influence has purchased their debt at a discount?

22 A. Well then, you know, then you also have the dynamic of a
23 bidder essentially having to pay a higher price than the
24 incumbent, the person who is already in the capital structure.
25 If that, I'll call it the inside bidder, the person who owns

LIGHTSQUARED, INC., ET AL.

165

1 this blocking position or significant position, has paid a
2 significant discount, then they're competing with cheaper
3 dollars effectively. So it makes it more expensive on a
4 relative basis for an outside bidder to actually compete.

5 So someone who owns, you know, 100 million dollars' worth
6 of debt and paid 25 cents for it and, you know, wants to bid
7 125 million dollars, it's a lot cheaper for them than the guy
8 on the outside who has to show up with the 125 million-dollar
9 check. And that, again, becomes sort of a dissuasive dynamic
10 from an outside bidder's perspective.

11 MR. STONE: That's all I have, Your Honor.

12 THE COURT: Thank you. Mr. Mundiya?

13 MR. MUNDIYA: Yes. May I approach, Your Honor?

14 THE COURT: Yes. Thank you.

15 CROSS-EXAMINATION

16 BY MR. MUNDIYA:

17 Q. Good afternoon, Mr. Derrough. How are you?

18 A. Good afternoon. I'm good, thank you. And you?

19 Q. We met a few days ago at your deposition. Do you remember
20 that?

21 A. I do.

22 Q. Good. Mr. Derrough, you have only been involved in two
23 situations where a competitor has entered the capital structure
24 of a company, right?

25 A. Two that I can recall.

LIGHTSQUARED, INC., ET AL.

166

1 Q. Okay. And one was the Global Ocean (sic) bankruptcy
2 thirteen years ago, right?

3 A. Golden Ocean.

4 Q. Golden Ocean, thirteen years ago.

5 A. Yeah.

6 Q. And the other one was the American Airlines bankruptcy
7 where the competitor was USAirways which owned a de minimis
8 amount of debt, is that right?

9 A. Correct.

10 Q. So other than those two situations you've not been
11 involved in any situations where a competitor has entered into
12 the capital structure of a debtor, correct?

13 A. I wasn't able to recall any at the deposition nor can I
14 recall any right now. I can't say for certain that I haven't
15 been, but I don't remember any as I sit here.

16 Q. Okay. And you didn't speak to any bidders involved in the
17 sales process in this case except for two entities, correct?

18 A. Correct.

19 Q. Okay. And one of those entities was -- there may be a
20 confidentiality issue here.

21 A. There is definitely.

22 Q. And I just don't want to trip up the --

23 THE COURT: All right, well, let's adopt a convention
24 and refer to them as party A --

25 MR. MUNDIYA: Bidder A?

LIGHTSQUARED, INC., ET AL.

167

1 THE COURT: -- or bidder A and let's figure out some
2 way to make sure that you and the witness --

3 MR. MUNDIYA: Right.

4 THE COURT: -- are on the same page in that regard.

5 MR. MUNDIYA: Fine.

6 THE COURT: All right?

7 MR. MUNDIYA: Okay.

8 THE COURT: Okay.

9 MR. MUNDIYA: That's a good idea.

10 Q. So let's talk about bidder A which begins with the
11 initials --

12 THE COURT: Let's not do that.

13 MR. MUNDIYA: All right, bidder A because there are
14 two bidders here.

15 THE COURT: Let's not do that.

16 MR. MUNDIYA: Okay.

17 THE COURT: Let's figure out --

18 THE WITNESS: Can we take a time out and he and I talk
19 in the courtroom?

20 THE COURT: Let's figure out a way. Mr. Mundiya, I'm
21 going to have you approach the witness --

22 MR. MUNDIYA: I'm going to do that right now.

23 THE COURT: -- and establish who bidder A is.

24 MR. MUNDIYA: That was --

25 THE WITNESS: I'll take the ham and Swiss.

LIGHTSQUARED, INC., ET AL.

168

1 MR. MUNDIYA: And I'll see you later. Okay.

2 Q. Okay, Mr. Derrough --

3 THE COURT: I just want to say this is my standard
4 announcement, all right. And my standard announcement is as
5 follows:

6 From time to time in proceedings like this because so
7 much is at stake, there comes into the courtroom a bit of
8 humor, and those who have that much at stake, I want them to be
9 aware that it doesn't reflect that we're not taking it
10 seriously, neither the Court nor the participants.

11 MR. MUNDIYA: Thank you, Your Honor.

12 THE COURT: All right. Thank you.

13 BY MR. MUNDIYA:

14 Q. So let's talk about bidder A. And you spoke to bidder A
15 sometime in 2013, right?

16 A. Correct.

17 Q. And bidder A did not ultimately make any proposal to make
18 an investment in LightSquared, right?

19 A. Correct.

20 Q. Okay. And you don't know why bidder A did not make a
21 proposal to invest in LightSquared, correct?

22 A. Correct, I do not know for sure, correct.

23 Q. Right. Well, they didn't tell you why they were not
24 making a proposal, right?

25 A. Correct.

LIGHTSQUARED, INC., ET AL.

169

1 Q. Right, okay. And with respect to bidder B, similarly
2 bidder B did not make the proposal to invest in LightSquared,
3 right?

4 A. Correct.

5 Q. Okay, and bidder B did not tell you why they were not
6 making a proposal for LightSquared, right?

7 A. I don't believe so.

8 Q. Okay. Were you involved in the outreach to strategic
9 investors?

10 A. No, not directly.

11 THE COURT: Mr. Derrough, I'm going to need you to
12 keep your voice up.

13 THE WITNESS: I'm sorry.

14 THE COURT: That microphone moves. Great. Good.

15 Q. You were not personally involved in any of those
16 discussions?

17 A. No.

18 Q. But LightSquared was talking to potential strategics,
19 correct?

20 A. Correct.

21 Q. Okay. And did you know that the potential transactions
22 involving strategics involved minority investments in the
23 company?

24 A. I don't remember the specific details of any of the
25 conversations around strategics. So they might have involved

LIGHTSQUARED, INC., ET AL.

170

1 minority or majority, I just don't -- I don't recall.

2 Q. So you don't know whether strategics were approached in
3 whole company bids or minority investments, no idea?

4 A. I don't, no.

5 Q. Okay. You've talked about blocking positions. Do you
6 remember that testimony?

7 A. I do.

8 Q. Okay. And when a company adopts a blocking position, is
9 it the case that the blocking position has an impact in a 363
10 sale?

11 A. Having that much of a capital structure has an impact, I
12 think, on the entire Chapter 11 process. And so being that big
13 of a constituent of Chapter 11, means you have a say in a
14 courtroom, you have a say in terms of trying to convince the
15 Court and other constituents what to do. So I think every
16 creditor who is significant has an impact on a Chapter 11 sale
17 process.

18 Q. But that wasn't my question. My question was, can a
19 blocking position be voted in a 363 sale?

20 A. There is no voting opportunity for creditors in 363 sales.

21 Q. Do you know if LightSquared pursued a 363 sale option in
22 this case?

23 A. That was one of the potential avenues, yes.

24 Q. But it was not the one you pursued, right?

25 A. As of right now, we're not doing that right now, I think.

LIGHTSQUARED, INC., ET AL.

171

1 Q. And you understand there are many reasons why somebody
2 would adopt a blocking position, right?

3 THE COURT: Mr. Mundiya, can I ask for a
4 clarification. You're using the phraseology "adopt a blocking
5 position" --

6 MR. MUNDIYA: Maybe obtain.

7 THE COURT: -- and I don't know what that means.

8 MR. MUNDIYA: Obtain, obtain.

9 THE COURT: Obtain.

10 MR. MUNDIYA: Obtain.

11 THE COURT: Thank you.

12 Q. There are many reasons a creditor would obtain a blocking
13 position, right?

14 A. Probably not hundreds of reasons, maybe --

15 Q. Right, but there are --

16 A. Probably you can count it on your hand.

17 Q. But there are reasons other than a reason to acquire the
18 debtor, right?

19 A. Correct, but the reason for having a blocking position is
20 its significance in the bankruptcy process.

21 Q. I understand that. But if you have a blocking position,
22 you have significant rights with respect to cram down
23 provisions, correct?

24 A. Correct.

25 Q. All right, so a creditor could obtain a blocking position

LIGHTSQUARED, INC., ET AL.

172

1 to prevent or to ensure that it gets the protections of the
2 cram-down provisions, correct?

3 A. The voting provisions often associated -- I mean, which
4 include the rules around cram-down, tend to turn on one-thirds,
5 two-thirds in terms of affirmative acceptance of a plan or
6 blocking a plan.

7 Q. Right, but creditors do obtain blocking positions in order
8 to get the benefits of the cram-down provisions, right?

9 A. I'm not sure if people think of it as cram-down versus
10 just blocking the affirmative approval of the plan.

11 Q. Okay. Now, you understand that in this case there was an
12 agreement or a plan support agreement that was entered into,
13 right?

14 A. Yes, I'm aware of that.

15 Q. Okay. And have you reviewed the plan support agreement?

16 A. I think I saw it at one point in time in the early summer,
17 but I haven't looked at it in -- since then.

18 Q. Okay. And you understand that SPSO and the ad hoc lenders
19 came to an agreement, right?

20 A. That's my understanding.

21 Q. Okay. And did you, do you know whether SPSO was under any
22 contractual duty to support the plan pursuant to that
23 agreement?

24 A. To support which plan?

25 Q. The ad hoc lenders' plan.

LIGHTSQUARED, INC., ET AL.

173

1 A. I believe so, but I don't recall. I don't recall the
2 details of the plan support agreement.

3 Q. Well, did you know that SPSO was under a contractual duty
4 to support the plan of the ad hoc lenders that involved the
5 LBAC bid.

6 A. That would make sense.

7 Q. Did you know that SPSO was under a contractual duty to
8 support the ad hoc lenders plan even if the LBAC bid was topped
9 by somebody else?

10 A. Again, that could make some sense, but I don't remember
11 the details of the plan support agreement.

12 Q. Okay. So when you spoke to investors in 2013 about the
13 presence of competitors in the capital structure, did you lay
14 out for those investors the terms and conditions of the ad hoc
15 lenders plan and SPSO's rights with respect to that plan?

16 A. No. What I tried to do was to lay out a path or road map
17 for them to try to get into the process and be aware.

18 Q. But you didn't explain to them that if they made a higher
19 and better bid than LBAC, that in some conditions SPSO would be
20 duty bound to support it, you didn't say that to them, did you?

21 A. I think I laid out paths where they could try to be a
22 winner.

23 Q. But did you explain to them that SPSO was contractually
24 bound to support a higher and better bid, even if it was other
25 than the LBAC bidder?

LIGHTSQUARED, INC., ET AL.

174

1 A. I'm not sure it would have been relevant, because their
2 auction could have been canceled. So my job was to try to
3 induce somebody to make a bid and to paint a path where they
4 could be a bidder.

5 Q. But you've talked about a blocking position and you didn't
6 tell these potential investors that there was a path whereby if
7 they made a higher and better bid that SPSO had a contractual
8 duty to vote in favor of that, you didn't tell them that?

9 A. No, because that would not have necessarily been exactly
10 the truth. The auction could have been canceled at the last
11 minute. The company could have decided to do something
12 different. So I couldn't guarantee them that if XYZ happened,
13 they would win.

14 Q. Did do you know that the plan support agreement in this
15 case was publicly filed in July, sometime in July?

16 A. Sounds about right.

17 Q. And do you know when the bid procedures order was entered
18 into?

19 A. I don't know.

20 Q. Okay. Does October sound about right?

21 A. It could be. I just don't know.

22 Q. Okay. So there was a time or there was a period of time
23 between the public filing of the PSA and the bid procedures
24 order, right?

25 A. There -- yeah, that sounds right.

LIGHTSQUARED, INC., ET AL.

175

1 Q. And during that time period there were no termination fee
2 provisions that were out there, correct?

3 A. That were no what?

4 Q. Termination fee provisions, expense reimbursement
5 provisions, because those provisions were approved as part of
6 the bid procedures order, right?

7 A. I don't know.

8 Q. Okay. Are you aware of any person who made a bid between
9 July and December other than LBAC?

10 A. I think I testified at my deposition I'm aware of several
11 proposals that were made; because I was not the day-to-day
12 person in every board meeting or involved in every
13 conversation, I can't be positive as to who did exactly what,
14 but I think I told you about at least two, maybe three
15 potential proposals I was aware of.

16 Q. Well, there was one was by -- was LBAC, right?

17 A. Let's ignore that one.

18 Q. Okay. And the other one was Centerbridge, right?

19 A. Correct.

20 Q. Okay. And Centerbridge arrived on the scene in November,
21 is that right?

22 A. I don't remember when. I mean I think we were talking to
23 Centerbridge as long as a year and a half ago. So I'm not sure
24 they arrived as late as you think they arrived.

25 Q. Okay. And Centerbridge withdrew its proposal sometime in

LIGHTSQUARED, INC., ET AL.

176

1 December, right?

2 A. I don't remember the timing, but it sounds fine.

3 Q. Right. And you have no idea why Centerbridge withdrew its
4 proposal, right?

5 A. I don't know for sure why they produced -- why they
6 withdrew their proposal, correct.

7 Q. And you don't know whether they withdrew their proposal
8 because there was a competitor in the capital structure of
9 LightSquared, right?

10 A. I don't know.

11 Q. Right. Besides Centerbridge, what other proposals did the
12 debtor receive?

13 A. I believe there is a proposal the debtor received from a
14 Harbinger-related process and I believe there is another
15 proposal that I think you characterized it as the Fortress bid
16 or Fortress proposal, which the debtor has been or has
17 considered. So that would be three beyond the LBAC.

18 Q. Bidder B, you spoke to them in the summer of 2013?

19 A. That's my recollection, yeah.

20 Q. And bidder B didn't make a proposal, did it?

21 A. No.

22 Q. Okay. And you don't know why they didn't make a proposal,
23 do you?

24 A. I do not.

25 Q. Okay. And you're not aware of any bidder, strategic or

LIGHTSQUARED, INC., ET AL.

177

1 financial, that failed to make a bid for LightSquared because
2 of the presence of a competitor in the capital structure,
3 correct?

4 A. Correct.

5 Q. Now, you testified to the fact that a competitor in the
6 capital structure can have a negative impact on the company,
7 right?

8 A. Correct.

9 Q. Okay. Are there other factors that can have a negative
10 impact on a debtor besides the presence of a competitor in its
11 capital structure?

12 A. You could probably list hundreds of things that could have
13 negative effect on companies.

14 Q. Let's talk about LightSquared in particular.

15 A. Okay.

16 Q. Would the fact that it had significant FCC concerns, would
17 that have an impact on potential bidders for LightSquared?

18 A. It would be a consideration.

19 Q. In fact, FCC approval is a significant issue for
20 LightSquared, isn't it?

21 A. FCC approval is a significant issue for anybody who holds
22 an FCC license and continuing FCC relationship.

23 Q. But you were aware of bidders who were raising FCC issues
24 in the summer of 2013, weren't you?

25 A. The question of the FCC relationship is one that any

LIGHTSQUARED, INC., ET AL.

178

1 investor is going to ask in this company or any other company
2 that has licenses.

3 Q. Okay. What about the presence of Mr. Falcone; wasn't that
4 raised by investors in the summer of 2013?

5 A. The presence of Mr. Falcone?

6 Q. Yes.

7 A. I'm not sure --

8 Q. Well, let me rephrase that. Was the role of Mr. Falcone
9 in LightSquared a subject of discussion with potential bidders
10 in the summer of 2013?

11 A. Yes, in my experience potential bidders always want to
12 know what the equity is going to do as part of a plan or sale
13 process.

14 Q. And was the subject of Mr. Falcone's issues with respect
15 to SEC problems the subject of discussion with investors?

16 A. I believe it was mentioned by one, at least one.

17 Q. And what did that investor say about Mr. Falcone's SEC
18 issues?

19 A. I don't know.

20 Q. Did you have that conversation?

21 A. I had the conversation with the two investors that we're
22 talking about, A and B, and I believe at least one of them
23 mentioned something about that in the overall conversation,
24 yes.

25 Q. Okay.

LIGHTSQUARED, INC., ET AL.

179

1 A. It was not the first, nor the second or third thing that
2 was probably discussed.

3 Q. But you don't have any recollection of what you were told
4 about Mr. Falcone's SEC issues?

5 A. I would have no expertise to say anything about that.

6 Q. Well, what did the questioner say about Mr. Falcone's SEC
7 issues?

8 A. I don't remember what they said.

9 Q. Now, the auction in this case was canceled, wasn't it?

10 A. I believe so.

11 Q. Okay. Who canceled it?

12 A. Usually it's the debtors who cancel auctions.

13 Q. Well, do you know what the purpose was for canceling the
14 auction?

15 A. I do not know all the details, no.

16 Q. Okay. When's the last time you spoke to Mr. Falcone?

17 A. It's probably been several months.

18 Q. Okay. And was that after SPSO made public its holdings in
19 Lightsquared?

20 A. Well, I think the Wall Street Journal article I want to
21 say was in May or June of 2013. So I think in my math it was a
22 couple, three months ago; it would probably be after that.

23 Q. Okay.

24 A. I mean, when you say made public, I think it became
25 publicly known.

LIGHTSQUARED, INC., ET AL.

180

1 Q. Right. And what did Mr. Falcone tell you about Mr.

2 Ergen's, or SPSO's holdings in LightSquared, if anything?

3 A. I don't remember talking specifically about that with him.

4 Q. Do you believe a competitor in the capital structure of a
5 company can have positive impacts?

6 A. I guess it's possible.

7 Q. All right, and it can have positive impacts because it can
8 attract other strategic investors, right?

9 A. I guess that's a possibility as well.

10 Q. And did you know that Mr. Falcone was of the view or may
11 have suggested to others that having Mr. Ergen or SPSO in the
12 capital structure might have a strategic impact, a positive
13 impact on the company?

14 MR. FRIEDMAN: Your Honor, object. It assumes facts
15 not in evidence.

16 THE COURT: I'm sorry, Mr. Friedman, say it again?

17 MR. FRIEDMAN: It assumes facts not in evidence. He's
18 making up a story and asking if he knows about it.

19 THE COURT: He's asking him if he knows.

20 MR. MUNDIYA: Yeah.

21 A. Can you ask the question again?

22 Q. Do you know --

23 MR. FRIEDMAN: Well, the implication that it happened,
24 he's implying that something happened that didn't happen and
25 asking if he knows about it.

LIGHTSQUARED, INC., ET AL.

181

1 MR. MUNDIYA: Okay, so let --

2 THE COURT: All right, let's -- Mr. Mundiya, why don't
3 you do it another way.

4 MR. MUNDIYA: I'll do it another way.

5 THE COURT: Everybody --

6 Q. Can up please turn to --

7 THE COURT: Everyone relax.

8 Q. If you could please turn to --

9 MR. MUNDIYA: Right. I got it.

10 Q. Could you please turn --

11 MR. GIUFFRA: Exhibit 36, Your Honor.

12 Q. If you could please turn to tab 8 in your binder.

13 A. Okay.

14 Q. If you could just take a moment to review this document.

15 This is an e-mail, Mr. Derrough, from Mr. Falcone to Ara Cohen.

16 Do you know who Mr. Cohen is?

17 A. I do.

18 Q. Who is he?

19 A. He is one of the main principals of Knighthead Capital,
20 which is a hedge fund and has been a holder of the company's
21 first lien debt for a very long time.

22 Q. And you've spoken to him about LightSquared on and off,
23 right?

24 A. Yes, I've spoken and met with Mr. Cohen a number of times
25 about LightSquared.

LIGHTSQUARED, INC., ET AL.

182

1 Q. Okay. And if you look at this e-mail dated May 5, 2012,
2 Mr. Falcone writes "I tried you. Maybe we shouldn't file if he
3 is certain the wagons, though I think he's a positive, may
4 bring in another strategic." Do you see that?

5 A. I do. What year is this?

6 Q. It's 2012.

7 A. Oh, okay. Let me just see. Okay, say again? So what
8 were you saying?

9 Q. Were you aware or do you have an understanding that Mr.
10 Falcone, with whom you have spoken, believed that having Mr.
11 Ergen in the capital structure be a positive for LightSquared?

12 A. Well, actually, I'm not sure you can read that here
13 because I don't -- May 2012, I don't think that we, as the
14 debtor, knew at that point that Ergen or DISH had acquired
15 debt, and I don't know if something is missing here but it says
16 "I just exchanged e-mails with Ergen" -- so I don't know if --
17 it looks like there is an initial e-mail that is missing.

18 Q. Okay.

19 A. So I don't know if it says in the initial e-mail that they
20 think it's Verizon. I don't know what it says in the e-mail.

21 Q. Well, I think tab 9 will maybe clarify that. Let's go to
22 tab 9, that's Defendant's Trial Exhibit 36. And this is the
23 day after May 5. And if you can read down to the e-mail
24 between Mr. Falcone and Matthew Goldstein -- do you see that?

25 A. Where are you looking?

LIGHTSQUARED, INC., ET AL.

183

1 Q. About halfway to the page.

2 A. From Falcone to Goldstein, okay.

3 Q. Re: one-week extension. And Mr. Falcone writes, "I can
4 sell these positions." Do you see that?

5 A. Yes.

6 Q. And then Mr. Goldstein replies, "Really, to whom?"

7 A. I see that.

8 Q. And then Mr. Falcone replies, "Ergen will prompt more
9 strategics to step in." See that?

10 A. I do.

11 Q. Okay. Did you discuss with Mr. Falcone at any point that
12 having SPSO in the capital structure would "prompt more
13 strategics to step in"?

14 A. Not that I recall.

15 Q. Did you have any discussions with Mr. Falcone on the
16 benefits of having SPSO in the capital structure?

17 A. Not that I recall.

18 Q. Did you have any discussions with Mr. Falcone about how
19 strategics might react to having SPSO in the capital structure?

20 A. Not that I recall.

21 Q. Well, do you have an understanding here today whether
22 having SPSO in the capital structure might encourage other
23 strategics to step in?

24 A. I think I've already told you my view on that.

25 Q. Okay.

LIGHTSQUARED, INC., ET AL.

184

1 THE COURT: I want to ask something of the parties
2 with respect to Defendant's Trial Exhibit be 39, which is at
3 tab 8.

4 MR. MUNDIYA: Tab 8.

5 THE COURT: Yes. At the very top, it's from Mr.
6 Falcone sent Saturday, May 5 at 7:48. I want to ask if you can
7 undertake to figure out whether this is an excerpt of a larger
8 chain of e-mails and I'd like you to produce, if it's not
9 subject to privilege, the entirety of what this is part of.

10 MR. FRIEDMAN: It's not, Your Honor. The e-mail
11 originated with Ara Cohen, and the reason there is nothing
12 there is because all Mr. Cohen said was I just exchanged e-
13 mails with Ergen, which was a joke, by the way, just so you
14 understand.

15 MR. MUNDIYA: Now he's testifying.

16 THE COURT: Well, he can get to that later. My
17 question is whether or not this is the entirety of the
18 document.

19 MR. FRIEDMAN: That is the entirety, yes, Your Honor.

20 THE COURT: Thank you. So it's one of those things
21 that happens when you send a text message times that when you
22 don't put in a subject, the subject, the type -- the text pops
23 into the subject line?

24 MR. FRIEDMAN: I think the message was put into the re
25 line. That's all there is, just a re line.

LIGHTSQUARED, INC., ET AL.

185

1 THE COURT: I see. Thank you.

2 BY MR. MUNDIYA:

3 Q. Mr. Derrough, you filed a declaration in this case in May
4 of 2012, correct?

5 A. I don't remember, but I'll take your word for it.

6 Q. Well, take a look at tab 8. make it easier.

7 A. Okay.

8 Q. You don't have to read the whole thing. Does this look
9 familiar?

10 A. It does. You showed it to me at my deposition.

11 Q. I did. And this was a declaration you filed in this court
12 under penalty of perjury in support of Moelis' retention,
13 correct?

14 A. Correct.

15 Q. Okay. And if you turn to the last page, which is -- the
16 last page, and it's Schedule 1, which is entitled "Potential
17 Parties-in-Interest", see that?

18 A. I do.

19 Q. Okay. If you turn to the last page, there is a category
20 for "Other Parties-in-Interest". That's page 3 of the
21 schedule. Do you see that?

22 A. Yes.

23 Q. Okay. And you identify in your declaration two of the
24 parties-in-interest, potential parties-in-interest in this case
25 as of May 2012 were Charles Ergen and DISH Network Corporation,

LIGHTSQUARED, INC., ET AL.

186

1 correct?

2 A. Well, I'm not sure if I identified it. I think what we
3 say in here is that we cross-checked based upon a list provided
4 to us by somebody, presumably the debtor's counsel.

5 Q. Right, but you attached this to a declaration that you
6 filed under oath, right?

7 A. Correct.

8 Q. And did you --

9 A. We said this -- we checked against this; we're not
10 representing that these are parties-in-interest. We're saying
11 we checked it based upon what was given us.

12 Q. And so the debtor gave you this?

13 A. Presumably someone on -- yeah, probably debtor's counsel.

14 Q. You were involved, in the summer of 2013, with others at
15 Moelis, right, on LightSquared?

16 A. Summer of 2013?

17 Q. 2013, yep.

18 A. I was involved, my colleagues, Mr. Hootnick and Mr. Holtz
19 are the principal day-to-day senior bankers on it, and I get
20 involved from time to time as is needed.

21 Q. All right. Did you attend meetings with the ad hoc
22 lenders in the summer of 2013?

23 A. I don't remember.

24 Q. Okay. Well, take a look at tab 4.

25 A. Okay.

LIGHTSQUARED, INC., ET AL.

187

1 Q. This is a long chain of e-mails involving Mr. Lauria and
2 others, including Mr. Hootnick. And we don't have to go
3 through the entire chain, but there is an e-mail that I would
4 like to refer you to, which is on page 2. It's the e-mail
5 dated Sunday, July 14th, 2013 at 8:34 p.m. Do you see that?
6 It's a carry-over e-mail.

7 A. Okay, so, well, it starts on the first page and then goes
8 onto the second page.

9 Q. Yup.

10 A. Okay.

11 Q. It's from Mr. Lauria to Mr. Barr with a bunch of CC's.
12 And Mr. Lauria writes, "We reached an agreement that was
13 announced to the Court on the morning of July 10th that LP
14 would promptly engage in negotiations with LBAC."

15 And then it goes on to say that there is a need to get a
16 meeting scheduled and it has been scheduled. Do you see Mr.
17 Lauria's e-mail there?

18 A. I see his e-mail, yes.

19 Q. All right. Was it your understanding that in July of 2013
20 the ad hoc lenders were concerned that the debtors were
21 stonewalling them?

22 A. There's been all kinds of accusations back and forth in
23 this case. So I'm not sure what the ad hoc lenders thought
24 versus what counsel asserted, so.

25 Q. Was it your understanding in the summer, on July 14th,

LIGHTSQUARED, INC., ET AL.

188

1 2013 that the ad hoc lenders believed that they were being
2 stonewalled?

3 A. No, because I didn't talk to the ad hoc lenders
4 themselves.

5 Q. Okay.

6 MR. STONE: Your Honor.

7 THE COURT: Yes, Mr. Stone.

8 MR. STONE: I've let Mr. Mundiya wander all over the
9 place. This is clearly beyond the scope of our direct
10 examination. He's not really put on as a fact witness.

11 Yes, I'm sorry.

12 I think it goes well beyond the scope of his direct
13 testimony. So I'm not sure where we're going with this.

14 THE COURT: Mr. Mundiya?

15 MR. MUNDIYA: He's a representative of Moelis. They
16 filed fee applications in this case. He's testified that he
17 had involvement in this process, and he clearly has some
18 knowledge as to what was going on in the July time frame which
19 goes to --

20 THE COURT: But that's beyond the scope of what the
21 direct testimony was.

22 MR. MUNDIYA: I think what this will show, what this
23 e-mail will show is lack of a factual basis for some of his
24 opinions, because you see in the e-mail that I'm about to get
25 to, which is the one above this one, where Mr. Hootnick

LIGHTSQUARED, INC., ET AL.

189

1 forwards this e-mail to him, Mr. Derrough says LBAC, question
2 mark.

3 So as of July 14, 2013, Mr. Derrough doesn't even know
4 who LBAC is. So that goes to the underlying basis for his
5 opinions.

6 THE COURT: I'm sorry, I'm just not connecting the
7 dots that you're asking me to connect.

8 MR. MUNDIYA: I'll move on, Your Honor.

9 THE COURT: Thank you.

10 (Pause)

11 MR. MUNDIYA: I'm done, your Honor. No further
12 questions.

13 THE COURT: All right.

14 MR. FRAWLEY: Your Honor --

15 THE COURT: Yes, Mr. Frawley.

16 MR. FRAWLEY: -- I'll be very brief.

17 For the record, it's Brian Frawley from Sullivan &
18 Cromwell for DISH and EchoStar.

19 CROSS-EXAMINATION

20 BY MR. FRAWLEY:

21 Q. Good afternoon, Mr. Derrough.

22 A. Good afternoon.

23 Q. Mr. Mundiya went over with you some of the reasons why
24 buyers might have been dissuaded from participating in any
25 LightSquared process here apart from the assertions regarding

LIGHTSQUARED, INC., ET AL.

190

1 Mr. Ergen, and you touched upon FCC issues and you touched upon
2 Harbinger/Mr. Falcone. I'd like to talk about perhaps some
3 other issues that might affect buyers' willingness to
4 participate.

5 In your experience does the mere presence of a bankruptcy
6 affect buyers' willingness to participate in a sale process?

7 A. Well, since most of my sale processes are in bankruptcy --
8 well, strike that.

9 Bankruptcy is a different environment for buyers to
10 participate in. So you don't always get the same subset of
11 buyers as you would get in a nonbankruptcy environment.

12 Q. All right, one of the things you referred to this
13 afternoon was in the levelness of the playing field and that
14 having an effect on potential bidders' interest in
15 participating, right?

16 A. Correct.

17 Q. And in a bankruptcy you could never be assured of a level
18 playing field because of the circumstances in bankruptcy,
19 right?

20 A. Things can always change in bankruptcy.

21 Q. All right. And when we --

22 A. That doesn't mean people don't bid on bankruptcies.

23 Q. And when we saw you for your deposition earlier this week,
24 we also talked about some other issues that could dissuade
25 buyers in respect of LightSquared, and I think one of the

LIGHTSQUARED, INC., ET AL.

191

1 things you mentioned was the size of the check or the size of
2 the investment required here, right?

3 A. I must say the dissuades buy -- one kind of buy -- you
4 know, the kind of house you might want to buy is probably
5 different from the kind of house that the guy selling hot dogs
6 on the corner is going to buy.

7 Q. Right. He gets a much bigger one than me.

8 A. A lot of hot dogs.

9 Q. Right.

10 A. So it's just different types of buyers. As a banker, when
11 you have a situation, you try to size the situation to the
12 potential investor or lender or whatever, certain types of
13 buyers or investors or lenders participate in small companies,
14 other ones participate in mid-size companies, otherwise
15 participate in large companies.

16 So it might dissuade a specific investor if it's big, but
17 it might actually induce a different investor if it's big.

18 Q. Right. But it may affect the pool of interest one way or
19 the other?

20 A. There is so much capital out there that it's really just
21 finding the right subset for the right size transaction.

22 Q. Right. And what about the --

23 THE COURT: Can I just ask you a question about that
24 statement, there's so much capital out there.

25 THE WITNESS: Yes, Your Honor.

LIGHTSQUARED, INC., ET AL.

192

1 THE COURT: Are you aware that LBAC's bid -- I'm not
2 sure exactly when it was first characterized as such -- but
3 that LBAC's bid has been characterized as a low-ball bid? Have
4 you ever heard that before?

5 THE WITNESS: I'm not sure I heard those phrases used,
6 by I know that there are people who believe and I think that my
7 firm believes that the value ascribed under the LBAC bid does
8 not equate with what we think the company is worth
9 intrinsically.

10 THE COURT: So would you connect up for me that view
11 and the statement that there is so much capital out there with
12 the observation that no one would be willing to come in and
13 bid?

14 THE WITNESS: Sure. So I think when we talk about
15 capital, you're really mostly referring to kind of, at least in
16 my mind when he's asking the questions, the financial investor
17 world, so private equity or hedge funds. This particular
18 situation lends itself to, in terms of maximizing the value of
19 these assets, to a strategic buyer, to leveraging the spectrum,
20 to leveraging what you can do here, especially -- and I think
21 Your Honor saw what we filed initially on a cash collateral
22 motion, some information around the scarcity of spectrum.
23 people who can use spectrum are strategics, not financial
24 buyers; they're just going to hold it for somebody else to sell
25 it later. So I think that was sort of what I meant about the

LIGHTSQUARED, INC., ET AL.

193

1 kind of availability of capital.

2 When we think about the price that DISH/Ergen is
3 offering here, and my belief is that it's a distinction without
4 a difference from the marketplace's perspective -- the
5 marketplace believes that this is a consolidated, you know,
6 effort -- it's -- it's a -- I'm not for sure I'd say low ball,
7 but it's a low offer relative to what we believe it is worth to
8 a strategic. And when we think about availability of capital,
9 that's not really what we think about strategics per se,
10 because usually strategics are writing a check out of their own
11 coffers, or they're going to raise debt financing to pay for
12 it, or they're going to issue stock.

13 THE COURT: The market understood, don't you think,
14 that the bid that was made was only enough to take out the LP
15 debt, in other words did not provide a recovery to the
16 preferreds, correct?

17 THE WITNESS: I think the market can do that math,
18 Your Honor, and I think the hedge fund world probably knew that
19 and figured that out. I think the, you know, bankruptcy
20 intricacies of this class getting something and that class not
21 getting something and who can really call the shots and who
22 can't call the shots is a whole layer of expertise and inside
23 baseball that is not very well known to strategics. And so I
24 think counsel's comment was right in that not every strategic
25 will play in bankruptcies, as a general statement, and we saw

LIGHTSQUARED, INC., ET AL.

194

1 that in Innkeepers, Your Honor.

2 Although, in this industry, people like Verizon and
3 AT&T have bought companies in bankruptcy before in distress.
4 They are familiar enough -- I mean, it's not a foreign place to
5 them. But you know -- I mean, I've run -- Paul Leek (ph.) ran
6 three auctions for Globalstar, we changed the rules every time,
7 and so people -- this is fifteen years ago. People, I think,
8 know that the rules can be changed. And with a strategic
9 investor in there who has such a significant stake, I think the
10 general perception, and frankly, I think accurately so, Your
11 Honor, is that they will be able to change the rules in a way
12 that will not favor me.

13 You know, if we're advising a strategic, I'd say buy
14 the debt, get a blocking position, because you're going to have
15 influence on the process -- I can't guarantee it, but very
16 likely you're going to have a lot of influence on the process.
17 You may even be able to cancel the auction and just negotiate
18 directly with creditors.

19 So I think you're right, Your Honor, that's the math
20 you can do and that's the math that we did with bidder A and
21 bidder C, and people I've tried to explain to them, well, if
22 you do this and, you know, they're -- they can only be paid one
23 hundred cents and then they don't have a stake, but you still
24 have a bankruptcy court that has uncertainty inherently in it
25 in terms of kind of what outcomes may be.

LIGHTSQUARED, INC., ET AL.

195

1 THE COURT: Okay, thank you. Sorry to interrupt.

2 MR. FRAWLEY: Thank you, Your Honor; that's fine.

3 BY MR. FRAWLEY:

4 Q. Just to follow up on some of the Court's questioning,
5 while you have suggested that this was a natural fit for
6 strategics, the two buyers that we talked -- you testified
7 about this afternoon, bidder A and bidder B, were not
8 strategics, correct?

9 A. Correct.

10 Q. And you've actually had never had any conversations with
11 potential strategic buyers of these assets; is that right?

12 A. I have not, but in preparation for my cash collateral
13 testimony, I spent a lot of time with my telecom partners to
14 really understand the strategic landscape and who was capacity
15 constrained in terms of Spectrum.

16 Q. And do you have an opinion today if the strategic was a
17 natural buyer of this company why LightSquared was out talking
18 to strategics about minority investments?

19 A. Presumably because the -- some of the stakeholders wanted
20 to maintain some upside beyond whatever price might get paid,
21 because there's a fundamental belief that there's a lot of
22 value here.

23 Now, I'm not sure that what you say is accurate. You'll
24 have to talk to one of my colleagues as to what we were asking
25 people to bid on.

LIGHTSQUARED, INC., ET AL.

196

1 Q. One of the matters you mentioned this afternoon in your
2 direct testimony was -- in terms of the ability to sell an
3 asset particularly in bankruptcy was finding a willing seller,
4 right?

5 A. Correct.

6 Q. And do you know whether we had a willing seller in the
7 case of LightSquared?

8 A. I believe that the independent committee was very much
9 looking for a transaction to maximize the value of the estates
10 and was open to -- I was going to say any type of transaction,
11 I think that's generally the case -- that would serve to do so.

12 Q. Okay. And when was that committee formed?

13 A. I don't remember.

14 Q. All right. We'll come back to that in a second.

15 I just want to finish out the list of potential items that
16 may have dissuaded bidders in respect of LightSquared. I think
17 you testified at your deposition that the pendency of the GPS
18 litigation and interference issues might dissuade potential
19 buyers; is that right?

20 A. It could.

21 Q. I think you also testified earlier on in this process that
22 the presence of Mr. Icahn also might have dissuaded some
23 buyers; is that right?

24 A. You said Mr. Icahn?

25 Q. Yes.

LIGHTSQUARED, INC., ET AL.

197

1 A. I think at my deposition we talked about Mr. Icahn.

2 Q. The presence of Mr. Icahn was not a positive for
3 LightSquared either, was it?

4 A. I think it's safe to say that.

5 Q. In your testimony earlier this afternoon, you indicated
6 that the sale process might be chilled by the presence of this
7 significant competitor in the capital structure, right?

8 A. I think competitor strategic bidder.

9 Q. Okay. Can you identify for the Court when, in the
10 chronology of events in respect of LightSquared, that that
11 chilling first arose?

12 A. Well, I'm not going to be exactly certain. I think from
13 my perspective when the Wall Street Journal article came out
14 that identified DISH/Ergen as being significant owners of the
15 debt, you know, it's one thing to read about something in
16 DebtWire, it's something very different to read about it in the
17 Wall Street Journal. People tend to believe the Wall Street
18 Journal, not taking anything away from DebtWire but -- and so I
19 think that the marketplace in general believed at that point
20 that, based upon what was written, that the Ergen/DISH entities
21 had a significant control on the process.

22 Q. And the Wall Street Journal article that you're referring
23 to in that testimony is the article that reported on the bid by
24 LBAC in late May of 2013; is that right?

25 A. Yes.

LIGHTSQUARED, INC., ET AL.

198

1 Q. And so in your testimony today, are you suggesting --

2 A. Like I said, it could have been earlier when -- my
3 recollection, and since I was not the day-to-day person, what I
4 would identify as then, but it could have been earlier. I just
5 don't know what other stories were out there when circulating
6 around.

7 Q. Right. Well, it's not possible that SPSO's debt ownership
8 dissuaded anybody unless their debt ownership was known, right?

9 A. Right. What I don't know is whether there's another
10 article a month before that in Bloomberg that talked about it.
11 I'm referring to what I'm not familiar with.

12 Q. Right. And I assume from your testimony earlier that you
13 and your colleagues from Moelis were not going out and telling
14 potential investors that Mr. Ergen was a substantial owner of
15 debt in LightSquared; is that right?

16 A. I don't believe so.

17 Q. Are you aware one way or the other as to whether or not
18 Mr. Falcone was telling the press that that was the case?

19 A. I have no idea.

20 Q. In your expert opinion, would telling the press that Mr.
21 Ergen was buying significant amounts of debt in LightSquared
22 potentially chill investor interest?

23 A. It could if that then became reported out into the
24 marketplace as a fact as opposed to something that someone is
25 saying.

LIGHTSQUARED, INC., ET AL.

199

1 Q. Okay. The sale process that you have testified might have
2 been chilled by Mr. Ergen's presence in the capital structure.
3 When, in your mind, did that sale process start?

4 A. I can't be sure. I mean, I'd say to the extent that --
5 some people would say that when their company is in bankruptcy
6 the sale process has started. I don't necessarily subscribe to
7 that view. But it certainly does get people to pay attention
8 to a situation. And I don't remember the sequence of events in
9 terms of what the company and the board were thinking about
10 doing at various points in time.

11 I know that there was an effort at one point by the
12 company, it started with Mr. Smith, to engage in conversations
13 with strategics. I don't recall whether that happened before
14 May or after May. I just don't recall. But I'd say that would
15 probably be a good starting point, but we probably had
16 conversations with people along the way even before that.

17 Q. And are you offering any opinion in this case about the
18 impact of having a strategic investor in the capital structure
19 on their ability to refinance?

20 A. I had not. If you want to ask me about it, I'm happy to
21 talk about it.

22 Q. In fact, I don't.

23 MR. FRAWLEY: I have no other questions. Thank you.

24 THE COURT: Mr. Stone?

25 MR. STONE: No redirect, Your Honor.

LIGHTSQUARED, INC., ET AL.

200

1 THE COURT: All right. Mr. Derrough, thank you very
2 much. Have a good afternoon.

3 THE WITNESS: Thank you, Your Honor.

4 THE COURT: Yes, Mr. Mundiya.

5 MR. MUNDIYA: Mr. Kiser will be here tomorrow morning.

6 THE COURT: Tomorrow morning, okay. So that means
7 we're done for today?

8 MR. STONE: Yes, Your Honor.

9 THE COURT: Okay.

10 MS. STRICKLAND: Your Honor, what time would you like
11 to begin?

12 THE COURT: Hold on one second, Ms. Strickland.

13 Mr. Barr, do you have anything you want to say?

14 MR. BARR: Sure.

15 THE COURT: Mr. Derrough, you can step down. Thank
16 you.

17 MR. BARR: For the record, Matt Barr of Milbank Tweed
18 on behalf of LightSquared.

19 Your Honor, my understanding is that -- well, let me
20 tell you, tomorrow the next witness would be Mr. Kiser. You
21 heard from Willkie that he'll be here in the morning.

22 THE COURT: Okay.

23 MR. BARR: The next witness on our list is Mr. Ergen.
24 Mr. Ergen will be here on Monday morning. So we could find
25 ourselves unfortunately with some time tomorrow afternoon not

LIGHTSQUARED, INC., ET AL.

201

1 in court.

2 THE COURT: Okay. There are worse things.

3 MR. BARR: Understood, Your Honor.

4 THE COURT: I was asking if you wanted to tell me
5 anything about any other matters that were noticed for today.

6 MR. BARR: I do, yes. So that was the first matter.

7 The second matter, Your Honor, you may recall we filed
8 a motion with respect to exit financing engagement letter for
9 JP Morgan. We agreed to move that till tomorrow with an update
10 today. We are still having discussions with JP Morgan and the
11 lenders, and the lenders have asked us to move that to Monday.
12 If it's okay with --

13 THE COURT: And the LightSquared lenders.

14 MR. BARR: Yes, the LightSquared lenders, yes.

15 If it's okay with Your Honor, I'd like to schedule
16 that for the first thing Monday morning --

17 THE COURT: Okay.

18 MR. BARR: -- so that we can get that out of the way.
19 I will tell you that I'm going to get back to my office and get
20 yelled at by JPM for moving it, but we're not prepared at this
21 point to go forward.

22 THE COURT: All right. Will you keep us apprised with
23 respect to whether or not I should be looking for objections to
24 read before Monday?

25 MR. BARR: Yes, Your Honor.

LIGHTSQUARED, INC., ET AL.

202

1 THE COURT: Okay.

2 MR. BARR: Unless Your Honor disagrees, maybe what we
3 should do is -- by 5 o'clock tomorrow, we will either have an
4 agreement or we will just say we're going forward. They can
5 file their objections. If they're resolved between 5 o'clock
6 tomorrow and Monday morning, we will e-mail chambers to let you
7 know.

8 THE COURT: That's fine with me, if it's fine with the
9 lenders. Look, if you -- let me put in my two cents. There's
10 nothing magic about 5 p.m. tomorrow from my perspective. So if
11 it's useful to you to extend it out until you know 6 p.m. on
12 Sunday, that's fine with me.

13 MR. BARR: It's a question I'll ask Ms. Gartenberg
14 because she'll be handling the hearing to prepare for the
15 objections. But we'll figure it out, Your Honor. We'll deal
16 with it.

17 THE COURT: I'm willing to do whatever most
18 facilitates your process. So just let us know.

19 MR. BARR: Thank you, Your Honor.

20 THE COURT: All right.

21 MR. BARR: Your Honor may recall that the brief
22 deadline or the deadline to file the brief in connection with
23 confirmation of the MAST UBS Chapter 11 plan is -- U.S.
24 bank is tomorrow. Your Honor, as Mr. Sussberg told you at the
25 beginning of the hearing, there's lots of discussions that are

LIGHTSQUARED, INC., ET AL.

203

1 going on.

2 THE COURT: So why don't we extend that date?

3 MR. BARR: We would extend -- the only thing I would
4 ask, Your Honor, is obviously that we have a period of time
5 between when they file their brief and when we actually start
6 confirmation --

7 THE COURT: Right.

8 MR. BARR: -- if it goes forward, for to us prepare.

9 THE COURT: Right. Well, since we don't know when
10 what we're doing here is going to end and we don't know yet if
11 there are going to be any additional developments, why don't we
12 just keep our eye on that and we can decide that later on. All
13 right?

14 MR. BARR: Thank you.

15 THE COURT: All right. Anything else, Mr. Sussberg?

16 MR. SUSSBERG: One other point, Your Honor -- Joshua
17 Sussberg, Kirkland & Ellis -- there were some discovery issues
18 relating to the stand-alone plan of the debtors.

19 THE COURT: Okay.

20 MR. SUSSBERG: Same category as Mr. Barr referenced
21 with respect to Mr. Dublin, ongoing discussions, we're meeting
22 and conferring. To the extent there is an issue, we'll bring
23 it up to Your Honor.

24 THE COURT: That sounds good, okay.

25 Mr. Dublin?

LIGHTSQUARED, INC., ET AL.

204

1 MR. BARR: I'm sorry, Your Honor, I tried.

2 THE COURT: It's okay.

3 MR. DUBLIN: Phil Dublin, Akin Gump, for MAST and U.S.
4 Bank. They tried really hard for me not to talk. We almost
5 got there. I think we're probably going to have to bring up
6 some issues tomorrow if we can't get there unresolving these
7 discovery issues because we're going to get into some timing
8 concerns.

9 THE COURT: All right. Well, it sounds like, since
10 we're going to not have a full day of trial, then why don't we
11 plan on dealing with that after we conclude? Do you folks
12 think that you're going to be done with the witness by
13 lunchtime tomorrow?

14 MR. MUNDIYA: My direct will be maybe an hour and a
15 half, perhaps two. No more than two.

16 THE COURT: All right.

17 MR. STONE: My cross will be shorter.

18 THE COURT: All right. So then that all works out.
19 Anything else?

20 MR. BARR: Your Honor, just one other motion, but
21 we'll talk to Mr. Dublin about it tonight, is the motion he
22 filed in connection with the DIP motions that we filed. We'll
23 ask if we can kind of push all dates out as well since we're
24 kind of keeping everything in abeyance.

25 THE COURT: Okay.

LIGHTSQUARED, INC., ET AL.

205

1 MR. BARR: Thank you.

2 THE COURT: All right. I think that's it. Have a
3 good evening.

4 IN UNISON: Thank you, Your Honor.

5 THE COURT: Clean up after yourselves. We'll lock up.
6 You're free to leave things here or bring them into your
7 breakout rooms, whatever you wish.

8 MS. STRICKLAND: 10 a.m., Your Honor?

9 THE COURT: 10 a.m.

10 (Whereupon these proceedings were concluded at 4:15 p.m.)
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I N D E X

3

4

WITNESS	EXAMINATION BY	PAGE
---------	----------------	------

5

Douglas Smith	Mr. Hirschfeld	109
---------------	----------------	-----

6

Douglas Smith	Mr. Freimuth	139
---------------	--------------	-----

7

Douglas Smith	Mr. Giuffra	150
---------------	-------------	-----

8

Douglas Smith	Mr. Hirschfeld	154
---------------	----------------	-----

9

William Derrough	Mr. Stone	157
------------------	-----------	-----

10

William Derrough	Mr. Mundiya	165
------------------	-------------	-----

11

William Derrough	Mr. Frawley	189
------------------	-------------	-----

12

13

E X H I B I T S

14

PLAINTIFF'S	DESCRIPTION	PAGE
-------------	-------------	------

15

161	E-mail from Lucy	127
-----	------------------	-----

16

DeFazio to board of

17

directors with agenda

18

attached

19

679	Minutes from a	143
-----	----------------	-----

20

LightSquared July 1,

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2013 board meeting

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C E R T I F I C A T I O N

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I, Dena Page, certify that the foregoing transcript is a true
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25

	143:6;144:14;146:7,10;155:13,15;195:23	actually (33) 17:25;18:4,19; 49:2;51:13;54:20; 55:12;74:14;76:20; 80:22;81:17;98:14; 102:12;103:10; 121:23;128:20,22; 130:13,19;132:22; 133:20,20;138:6; 142:5;150:6,25; 151:3;152:12;165:4; 182:12;191:17; 195:10;203:5	29:12 admonished (1) 153:25 adopt (4) 101:2;166:23; 171:2,4 adopted (1) 127:5 adopts (1) 170:8 advance (4) 55:6;72:13;85:24; 96:25 advancement (1) 31:13 advantage (1) 138:6 Adversary (12) 2:4;11:15,17;12:7, 8,10,25;13:5;14:10, 12;15:22;16:1 adverse (1) 62:5 advice (1) 32:9 advised (1) 32:12 advising (1) 194:13 advisor (3) 25:22;37:4;135:7 advisors (7) 14:7;31:25;36:24; 37:8;62:18;69:4; 129:16 advocate (1) 43:2 affect (4) 13:4;190:3,6; 191:18 affected (2) 42:11;105:19 affects (1) 55:17 affiliate (5) 58:7;69:23;86:19; 87:1,22 affiliated (3) 40:23;128:1; 152:15 affiliates (4) 20:18;56:15;81:15; 86:8 affirmative (2) 172:5,10 affirmatively (1) 87:17 afford (1) 164:8 afternoon (15) 108:22;139:21,22; 156:15;157:3; 165:17,18;189:21,22;	190:13;195:7;196:1; 197:5;200:2,25 afterthought (1) 73:19 again (32) 20:5;35:20;45:4; 46:10,14;50:23; 51:23;59:1;85:1; 87:10,10;89:5;92:6; 96:18;97:2,14;98:25; 99:4;102:3;107:7,17, 24;118:5;138:11; 139:23;154:25; 160:18;165:9; 173:10;180:16,21; 182:7 against (19) 16:5;20:7;48:11; 73:18;74:18;79:13; 88:17;89:6,16,23; 90:8;100:6,9;101:13; 104:14;105:6;107:2; 134:8;186:9 agency (12) 79:14,14,17;85:22, 25;90:14;93:17,22; 98:21;100:10,21; 107:10 agenda (3) 67:15;126:18; 127:13 Agent (8) 5:3;83:22;93:12, 12,24;98:21;99:11; 100:12 agents (2) 70:2;100:7 aggregate (1) 96:8 aggressively (1) 23:23 ago (14) 43:23;77:8;104:23, 25;139:25;150:22; 151:4,8;165:19; 166:2,4;175:23; 179:22;194:7 agree (9) 11:16;16:11,16; 63:7;82:17;87:1,1; 103:19;146:14 agreed (2) 155:10;201:9 agreement (50) 11:4;13:4,9,23,25; 16:23;20:20;22:2; 23:9;29:25;41:4,5,6, 9,15;70:15;76:2; 79:2,16;80:6,7; 82:11;84:22;86:4; 88:2;90:5;94:24; 99:5;104:16,19; 106:19;123:24;
#				
#607 (1) 2:22	accurately (1) 194:10 accusation (1) 50:2 accusations (1) 187:22 accusing (1) 50:2 ACE (1) 8:12 achieve (2) 56:14;62:19 achieved (1) 119:7 acknowledged (1) 96:21 acquire (4) 52:7;64:18;125:23; 171:17 acquired (6) 29:8;58:7;77:17; 116:15;117:24; 182:14 acquirer (2) 105:20,20 acquiring (1) 161:10 Acquisition (12) 6:13;26:2;29:15; 40:8,12,12;46:24; 47:8;91:14;92:3; 102:25;134:24 acquisitions (3) 64:23;65:1;118:3 across (2) 110:11;155:25 act (3) 46:2,3;87:24 acting (8) 37:18;44:10;49:1, 10;70:2,4;98:23; 100:7 action (6) 44:6,7;89:6,16; 90:13;107:11 actions (8) 45:7;81:24;90:15; 94:10,11;98:14; 99:11;105:7 active (3) 14:11,12;59:22 actively (1) 157:21 activities (2) 114:16;161:24 acts (4) 93:12;100:12,12, 13 actual (4) 48:10;75:25;101:1; 164:9	Ad (30) 4:2,10;11:9;13:18; 14:11;16:14;19:1; 40:19,25;41:3;46:23; 50:21;70:20;72:19; 103:2;104:19;131:2; 147:24;148:12,24; 172:18,25;173:4,8, 14;186:21;187:20, 23;188:1,3 ADAM (1) 6:8 add (2) 86:14;87:24 added (3) 87:19,21;103:21 addition (5) 25:9;29:18;88:9; 90:7;132:18 additional (2) 149:6;203:11 address (1) 22:17 addressed (2) 121:6;123:24 addressees (1) 126:7 addresses (2) 23:1;33:14 addressing (1) 126:24 adds (1) 164:16 adduce (1) 75:12 adjacent (2) 121:21;122:4 administration (1) 55:17 Administrative (2) 5:3;83:22 admissibility (1) 146:17 admission (2) 127:9;143:11 admits (2) 24:11;29:20 admitted (1) 29:14 admittedly (1)		

124:3;126:25; 130:12,16;141:19; 148:23;150:9; 172:12,12,15,19,23; 173:2,11;174:14; 187:12;202:4 agreements (1) 24:15 agrees (2) 64:19;81:7 ahead (7) 15:16;33:5;58:11; 69:3;97:13;132:23; 161:4 airlines (2) 159:21;166:6 AKIN (2) 5:2;204:3 al (2) 2:5,5 Alan (2) 17:11;108:23 align (1) 23:25 allegation (1) 101:15 allegations (1) 74:5 allege (1) 88:22 alleging (1) 101:9 alliance (1) 116:25 allocated (1) 121:23 allocations (1) 119:3 allow (3) 21:9;26:3;29:16 allowances (1) 104:20 allowed (4) 21:10;57:9,10; 106:10 almost (7) 101:18;129:13; 137:21;138:2,10; 159:20;204:4 alone (1) 39:4 along (8) 41:24;42:8;53:8; 60:21;66:10;73:11; 154:10;199:16 alter (1) 56:15 alternatives (2) 14:5;104:1 although (4) 25:16;60:1;64:11; 194:2 always (9)	12:23,24;54:21; 106:4;139:2;164:15; 178:11;190:10,20 amass (1) 46:22 amassed (2) 39:24;48:3 ambiguity (2) 14:22;16:14 AMBRUOSO (1) 4:16 amend (1) 127:6 amended (1) 16:18 amending (4) 127:1,16,18,20 America (1) 8:3 American (2) 8:12;166:6 Americas (1) 4:11 AMISH (1) 8:8 among (2) 52:21;63:20 amount (11) 29:20;62:6;71:12, 15;93:2;115:16; 130:23;148:25; 161:11;162:9;166:8 amounts (1) 198:21 analog (1) 38:20 analysis (1) 12:23 analyzed (1) 24:11 analyzing (1) 11:12 ancillary (1) 118:13 ANDREW (1) 4:16 Angeles (3) 7:13;158:1,2 announced (1) 187:13 announcement (3) 52:24;168:4,4 answered (1) 22:7 antagonistic (1) 62:5 antennas (1) 110:14 anti- (1) 88:15 anymore (2) 72:15;99:8 apart (3)	68:2,3;189:25 apologize (3) 15:16;133:16; 138:24 appear (4) 19:11;141:23; 143:6,9 appearance (1) 54:10 appeared (2) 109:1;116:16 appears (6) 51:3;86:24;143:23; 146:1,7;155:3 application (2) 149:21;160:25 applications (3) 147:14,17;188:16 applied (1) 120:1 applies (3) 17:14;88:10,19 apply (4) 19:2;84:10;87:5; 88:12 applying (1) 60:20 appointed (4) 66:17,18;78:18; 92:7 appointment (1) 92:10 appreciate (3) 69:10;74:2;133:6 apprised (1) 201:22 approach (5) 73:14;101:2;139:7; 165:13;167:21 approached (1) 170:2 appropriate (2) 58:19;61:19 approval (18) 41:16;72:21;91:24; 95:21;103:13; 118:20;119:21; 120:3,24;121:16; 123:6;124:9;138:3; 144:9,17;172:10; 177:19,21 approvals (3) 60:17;64:10;120:6 approve (4) 66:2;78:8;94:17; 120:25 approved (13) 41:8;91:21;123:4; 124:25,25;138:3,7; 141:16;147:17,20; 149:16;152:24;175:5 approximately (2) 120:5;128:9	April (10) 49:12;96:8;109:23, 25;121:1,5;145:16, 19,20;146:2 Ara (2) 181:15;184:11 A-rated (2) 36:1,6 arbitration (1) 158:20 area (3) 110:11;139:1,2 areas (2) 23:15;157:18 arena (1) 161:23 argue (2) 53:6;136:5 arguing (1) 93:4 argument (5) 53:4;69:20;99:10; 102:21;108:12 arms (1) 87:15 arm's-length (1) 84:1 arose (1) 197:11 around (15) 21:6,7,14;23:9; 29:3;48:18;73:3; 125:13;157:20; 161:10,22;169:25; 172:4;192:22;198:6 ARPS (1) 4:1 arrived (3) 175:20,24,24 article (6) 47:25;179:20; 197:13,22,23;198:10 articulate (1) 16:13 ascertain (1) 88:24 ascribed (1) 192:7 aside (1) 70:1 aspect (1) 141:11 aspects (3) 110:5;115:10; 123:11 asserted (2) 136:11;187:24 assertions (1) 189:25 assessing (1) 13:21 asset (8) 20:24,24;29:4;	34:20;41:5;106:11, 19;196:3 assets (18) 21:2;25:23;26:2, 18;28:2;29:16;35:8; 36:6;39:19;61:1,4; 67:21;103:12; 116:12;132:19; 163:24;192:19; 195:11 assignee (5) 84:25;86:17;88:18, 20,25 assignees (2) 83:25;86:7 assignment (1) 88:16 assignments (3) 88:12;112:1; 157:22 assignor (6) 88:16,17,20;89:7, 16,24 assisted (1) 91:1 assisting (2) 98:15,18 associated (8) 115:25;119:23; 121:3,16;126:25; 128:18;152:21;172:3 assume (7) 97:10,11;146:9,17; 153:20;154:9;198:12 assumed (1) 101:19 assumes (2) 180:14,17 assumption (1) 163:23 assured (2) 75:9;190:17 AT&T (9) 51:12,16,17,22; 140:15,21;141:10,11; 194:3 AT&T's (1) 56:5 ATC (6) 118:7,12,13; 119:23;120:16; 121:12 attached (6) 41:4;69:17;126:18; 127:3,14;186:5 attachments (2) 126:10,13 attacking (1) 72:19 attempt (2) 23:9;30:6 attempting (1) 117:5
---	---	---	---	---

attend (1) 186:21	12:5;24:14;58:1; 104:17;116:18;	bandwidths (1) 67:8	basically (5) 27:15;95:17;	beneficiaries (1) 96:25
attended (1) 136:8	117:5;125:22;128:4; 131:7;153:7;154:15;	Bank (6) 4:21;5:3;54:11;	100:20;102:17,18	beneficiary (3) 22:24;26:15;89:4
attention (7) 79:10;126:6; 145:23;146:24; 148:2,15;199:7	18;168:9;172:14; 173:17;175:8,10,15; 176:25;177:23; 182:9;192:1;198:17	58:14;202:24;204:4	basis (12) 32:11;43:15,23; 73:18;79:15;89:17; 115:1,3;120:20; 165:4;188:23;189:4	benefit (8) 37:18;74:11;82:8; 93:5,6;94:9;101:12; 138:1
Attorneys (13) 4:2,10,21;5:3,12, 21;6:3,13;7:3,11,19; 8:3,12	away (5) 24:24;46:8;68:4; 80:12;197:18	banker (3) 103:2;163:2; 191:10	Bates (1) 143:20	benefits (3) 27:17;172:8; 183:16
attract (1) 180:8	AWS (1) 116:20	bankers (10) 55:25;133:17,17, 18:20,21,21,25; 134:20;186:19	bearing (1) 78:14	BENSON (2) 6:2;151:11
attractive (4) 12:11;68:8;83:24; 103:13	AWS-4 (15) 115:19,25;116:1, 12;121:20;122:24; 124:10,14,15,18,23; 125:9,16;149:13,17	banking (3) 157:25;158:3,16	bears (6) 76:19;77:7;92:13; 94:9;99:9;107:14	BERGMAN (1) 6:9
attribute (1) 63:1		bankruptcies (2) 190:22;193:25	became (11) 11:13;31:23;48:10; 68:13;112:18; 113:24;124:23; 125:20;130:20; 179:24;198:23	BERKOFF (1) 5:25
auction (16) 65:18;116:21,22, 24;117:7;121:24; 122:16,18;124:5,6; 162:23;174:2,10; 179:9,14;194:17	B	bankruptcy (45) 36:10;45:20;53:20, 24;54:12;55:3;56:13; 59:2;61:20;64:24; 79:8;89:15;98:20; 104:8,20;106:13; 119:15,16,19;127:19, 23;129:17;130:12; 140:9;151:19; 152:13;159:1,11; 162:5,23;164:15; 166:1,6;171:20; 190:5,7,9,17,18,20; 193:19;194:3,24; 196:3;199:5	become (3) 18:11;68:8;111:5	Besides (2) 176:11;177:10
auctions (10) 116:20;125:25; 160:4,5,7;164:6,6,13; 179:12;194:6	bachelor (1) 111:15	banks (6) 131:21;145:10,14, 17;147:1,6	becomes (3) 62:2;163:11;165:9	best (7) 15:21;21:11,12; 31:17;56:2;130:17; 147:9
August (1) 120:8	back (36) 18:13;32:24;33:2; 34:13;36:20;48:5; 50:16,18,20;51:11, 12;52:2,2,3,3;58:18; 62:6;81:20;86:22,23; 91:15;95:4,11;96:1; 100:18;105:17; 108:14,20,20;116:5, 18;134:6;156:19; 187:22;196:14; 201:19	Barr (47) 17:19,20,20;18:1,5, 18,20,22;19:17,20, 23;20:4;31:6,18; 40:10;52:12;70:23; 71:1,14;74:13; 108:16;138:17,20,24; 139:1;187:11; 200:13,14,17,17,23; 201:3,6,14,18,25; 202:2,13,19,21; 203:3,8,14,20;204:1, 20;205:1	becoming (3) 128:4;135:12; 150:19	bet (2) 51:24;60:9
authority (5) 26:22;27:12;93:15; 94:21;98:17	backdrop (2) 66:13;68:23	Barry (1) 52:12	began (5) 21:19;61:18;64:3, 5;92:2	better (9) 54:16;67:4,18; 94:22,24;99:4; 173:19,24;174:7
authorization (5) 119:9;121:12,13, 14;123:1	background (2) 10:13;111:13	BARTLETT (1) 4:20	begin (3) 10:24;18:19; 200:11	betting (1) 52:13
authorizations (1) 119:11	backing (1) 51:5	base (1) 161:21	beginning (5) 42:8;50:7,12; 111:13;202:25	beyond (5) 176:17;188:9,12, 20;195:20
authorize (1) 45:1	backstopping (1) 70:13	baseball (1) 193:23	begins (4) 81:3;84:18;126:7; 167:10	bid (46) 16:16;27:21,22; 28:2;30:12,15;36:19; 40:21;42:12;59:10; 64:13;66:3;68:10,11; 78:8;105:16;116:25; 119:16,16,18;124:5; 132:19;137:12; 161:25;165:6;173:5, 8,19,24;174:3,7,17, 23;175:6,8;176:15; 177:1;190:22;192:1, 3,3,7,13;193:14; 195:25;197:23
authorized (5) 23:19;26:20;45:3; 77:11;100:12	bad (5) 49:6;57:14;59:8; 70:12;102:17	based (10) 55:7;79:16;101:13; 104:6;105:7;116:8; 162:2;186:3,11; 197:20	behalf (11) 17:12,21;18:25; 26:8;30:25;45:2; 53:18;86:22;108:23; 130:5;200:18	bidder (35) 116:23;117:2; 161:10;163:15,19,25; 164:8,14,18,20,23, 25;165:4;166:25; 167:1,10,13,23; 168:14,14,17,20; 169:1,2,5;173:25; 174:4;176:18,20,25; 194:20,21;195:7,7; 197:8
authorizes (1) 45:7	Bal (2) 22:12,15	basic (4) 21:16;44:8;92:20; 136:1	behind (14) 47:14;101:20; 107:6;128:20,25; 129:2,11,12,14,20, 23;130:1;132:17; 153:21	bidders (16) 159:24;160:22; 161:19,20,24;162:17; 163:5,17;164:19;
availability (2) 193:1,8	balance (1) 156:15		beholder (1) 162:13	
available (4) 103:25;115:5; 125:23;126:1	ball (1) 193:6		belief (2) 193:3;195:21	
Avenue (5) 4:11,22;5:14;6:14; 9:3	ballpark (1) 142:4		belies (2) 102:9;104:10	
avenues (1) 170:23	band (11) 116:12;119:5; 121:19;122:9,13,25; 123:10,13;124:17; 125:16,17		believes (2) 192:7;193:5	
average (1) 164:14	bands (2) 124:16;125:16		below (1) 148:24	
avoid (1) 88:8	bandwidth (1) 67:8		beneficial (1) 155:6	
awarded (1) 120:20				
aware (23)				

166:16;167:14; 177:17,23;178:9,11; 196:16 bidders' (1) 190:14 bidder's (2) 162:22;165:10 bidding (3) 44:11;55:9;102:15 bids (3) 67:6,7;170:3 big (6) 64:21;72:25;77:2; 170:12;191:16,17 bigger (1) 191:7 billion (9) 37:20,22;38:9; 39:24;40:18;48:3; 93:3;103:14;124:6 billionaire (1) 51:7 billion-plus (1) 37:19 billions (5) 55:21;56:7;62:22; 63:2,9 bills (2) 34:4;47:4 bind (2) 93:15;94:18 binder (5) 126:4,4;142:22; 148:3;181:12 binding (2) 41:7,8 BINGHAM (1) 5:11 bit (5) 93:22;110:17; 113:19;162:13;168:7 black (1) 93:9 Black's (1) 85:7 Blackstone (3) 9:12;15:14;103:2 blame (1) 79:6 Block (22) 54:13,21,22;68:10; 116:2,4,6,7,8;121:21, 22,24;122:3,16,18, 22,23,24,24;124:5, 17,17 Blockbuster (1) 64:22 blocked (1) 69:11 blocking (31) 23:11;26:10;65:14; 69:23,23;134:11; 138:12;161:11,16;	162:3,5,12,20; 163:16;164:20; 165:1;170:5,8,9,19; 171:2,4,12,19,21,25; 172:6,7,10;174:5; 194:14 Blocks (3) 54:22;116:1,21 blog (1) 51:3 Bloomberg (1) 198:10 blue (1) 47:4 bluffing (2) 62:18,18 board (69) 25:25;26:1,24; 27:19;29:14,15,22; 39:25;41:8,12,13,16; 44:24;45:1,6,9,10,11, 16;64:9,25;66:19; 67:8;76:11,13;78:1,8, 10,17;90:21,22;91:7, 8,15,21,25;92:4,12, 21,21,23,25;94:17; 95:4,21;96:2,2; 99:13;126:17,19,19, 23;127:5,13;142:16; 143:2,16;144:2,11, 14;145:17;146:1,2; 147:11;150:15; 151:10;152:15; 175:12;199:9 boards (6) 27:9;69:2;76:8; 77:11,15;91:5 board's (1) 27:6 boils (1) 53:22 bonds (2) 49:17;52:19 book (1) 86:3 booked (2) 37:19;38:9 bore (1) 97:2 born (1) 105:25 borne (1) 78:15 borrower (1) 86:7 boss (1) 61:6 both (9) 21:19;35:20;55:23; 56:17;69:2;93:23; 102:16;119:17,20 bothered (1) 56:4	bottom (5) 50:14,22;51:14; 81:25;126:7 bought (22) 27:23;31:16,20; 33:17;34:19,22; 38:11,14;39:3;49:17; 50:3;52:19;64:13,17, 22,24,24;70:3;76:16; 77:7;91:25;194:3 bound (2) 173:20,24 boxed (1) 134:13 breach (30) 44:6,7,13;70:6; 75:24,25;81:10,11; 84:20,22,23;88:21, 22,22;89:5,17,20,21, 22,23;90:1,5,11,11, 13;100:5,16,17; 104:15;108:2 breached (2) 43:20;44:15 breaches (1) 44:14 break (9) 18:8,11,13,15,16; 99:20;139:12;156:2, 4 breaking (1) 162:1 breakout (1) 205:7 BRIAN (5) 7:23,24;73:12,12; 189:17 brief (12) 11:1;20:1;31:18; 67:12;73:22,24; 81:22;94:13;189:16; 202:21,22;203:5 briefly (2) 11:20;91:10;110:7; 157:23 briefs (1) 64:23 bring (10) 30:21;53:1;101:7; 133:17,19,21;182:4; 203:22;204:5;205:6 bringing (1) 101:12 brink (2) 30:21;36:9 Broad (4) 7:20;85:22;105:10, 10 broadband (1) 116:19 broader (5) 80:9;83:25;85:19; 87:17;107:21	broadly (2) 132:18;160:5 Broadway (1) 6:4 broke (1) 104:4 broker (2) 55:22;56:2 brokers (3) 55:24;61:2,4 Brothers (1) 157:25 brought (4) 16:5;105:5,6; 107:11 Brown (1) 15:9 Bryant (1) 5:4 build (5) 24:1;29:12;112:12; 117:19;118:17 building (5) 107:6;110:5; 113:17,17,20 build-out (4) 112:8,15;119:21; 124:13 built (1) 110:13 bunch (5) 38:16;64:13;66:9, 14;187:11 burden (6) 31:4;53:6;74:11, 17;75:19;93:14 burdens (1) 61:16 Business (24) 5:13;30:23;36:25; 37:1,1;56:24;60:6,13, 14,15,15,16,18;61:8; 69:25;110:5;111:4, 10,24;112:9,10; 113:23;117:14,17 busy (3) 60:12;64:9;67:20 buy (46) 21:23;22:1,4,8; 24:18;25:6;30:19; 32:6,13,20;33:7,12; 36:2;40:1,2,6;45:2; 46:17;48:18;51:25; 54:3;55:9;57:15,20; 58:16,18,19;61:1,23; 64:5,15;65:15,24; 69:22,24;77:11; 94:23;99:3;119:16, 18;134:11;191:3,3,4, 6;194:13 buyer (14) 32:17;33:12;34:17; 49:13,15;104:21;	131:8,8,10;161:15; 163:10,12;192:19; 195:17 Buyers (12) 105:10;189:24; 190:9,11,25;191:10, 13;192:24;195:6,11; 196:19,23 buyers' (2) 190:3,6 buying (20) 24:12,16;25:23; 27:3;32:16;34:10; 47:19;62:17;64:1; 95:17;96:23;102:6; 130:25;153:13,17,24; 154:7,17;158:6; 198:21 buys (1) 161:16
C				
CA (1) 7:13 cable (1) 116:24 Cablevision (1) 50:20 calculation (1) 101:25 call (14) 39:11,11;55:25; 56:4;72:23;108:24; 109:5;121:21; 148:15;152:18; 157:1;164:25; 193:21,22 called (5) 61:3;63:5;113:24; 128:7;140:23 Calling (2) 56:2;141:7 calls (3) 55:22;56:19;72:16 came (18) 21:5;28:14;35:18; 45:24;51:7;58:18; 71:1,18,25;72:2; 87:16;114:10; 116:11;134:8; 137:20;140:10; 172:19;197:13 camera (1) 40:4 can (108) 10:7;12:10;13:1,2; 15:4,6,21;18:10,10, 12,19,20,23;24:18, 24;30:16;32:20;33:7; 41:14,20;47:17;54:3, 3,10;55:15,16;56:21, 23;57:20;58:16,18;				

61:9,10;64:5;65:16; 17:17;67:9;74:14; 75:12;78:21;83:15; 87:25;94:19,22; 96:16,17;97:10; 99:11;112:20;114:2; 115:21;118:2;125:2; 126:3,16;130:9; 132:21;133:5,14; 136:15;137:22; 139:7;141:4;142:21; 146:19;151:21,23; 152:7,9;157:23; 161:25;162:3,8,10; 165:25;166:13; 167:18;170:18; 171:3,16;177:6,9; 180:5,7,7,21;181:6; 182:12,23;183:3; 184:6,16;190:20; 191:23;192:20,23; 193:17,21;194:8,20, 22;197:9;200:15; 201:18;202:4; 203:12;204:23 cancel (2) 179:12;194:17 canceled (5) 164:7;174:2,10; 179:9,11 canceling (1) 179:13 candid (1) 33:23 capabilities (1) 67:10 capability (2) 120:14,18 capable (1) 101:24 capacity (9) 37:6,21;85:15; 91:1;98:19;109:19, 24;112:7;195:14 CAPITAL (51) 2:4;5:12;6:3; 15:10;20:18,22; 22:10;24:16;31:9; 38:5;62:22;63:3; 75:2;101:16;102:10; 104:6;114:9;127:22; 159:6;161:12,17; 162:7;163:11;164:3, 9,24;165:23;166:12; 170:11;173:13; 176:8;177:2,6,11; 180:4,12;181:19; 182:11;183:12,16,19, 22;191:20,24;192:11, 15;193:1,8;197:7; 199:2,18 capitalized (2) 22:13,21	capture (1) 58:11 care (1) 57:12 cared (1) 106:9 career (2) 114:13;157:25 careful (1) 16:7 carefully (1) 68:17 Carl (1) 51:6 Carlos (5) 50:16;51:1,7; 52:25;56:4 Carlston (1) 157:19 carriers (6) 140:11,13;142:1,8; 144:3,17 carry (1) 131:2 carry-over (1) 187:6 CASE (83) 4:9;12:24;13:18; 15:10,15;16:8;18:25; 20:15;23:5;24:23; 29:7;44:7;53:22; 54:9,20;55:15;59:16, 17;62:20;68:22; 69:25;72:2;73:17; 74:2;75:18;76:3,12, 14,15;79:6,13,23; 80:13,23;81:3,5,8,10, 20,25;82:5,6;83:14; 84:13,15,18;85:10; 87:11;88:13,14; 90:12;91:20;94:6,21, 22,24;97:23;98:19; 99:4;101:15;105:2,8, 9;106:25;107:23,24; 109:1;162:16; 163:10;166:17; 170:9,22;172:11; 174:15;179:9;185:3, 24;187:23;188:16; 196:7,11;198:18; 199:17 cases (21) 11:16;20:8,10; 26:4;27:20;28:1,12, 13;29:17;30:13;40:9; 45:6;54:25;55:5,11; 59:22;63:19;70:20; 71:12;85:4;159:7 cash (11) 25:19;30:21;55:8, 10;59:9;66:3;69:25; 78:8;95:16;192:21; 195:12	Castle (1) 5:21 catalog (1) 63:23 catch (1) 33:4 category (2) 185:19;203:20 cause (11) 56:10;72:24;78:8, 21,22;89:6,15;90:10, 11,13;133:25 caused (4) 28:11,13;62:22; 63:2 causing (1) 100:17 CC's (1) 187:11 cellular (4) 112:2,12,13,15 Centaurus (1) 5:12 center (1) 80:23 Centerbridge (6) 175:18,20,23,25; 176:3,11 centered (1) 125:13 cents (3) 165:6;194:23; 202:9 Century (1) 7:12 CEO (3) 72:18;150:19; 152:24 certain (10) 24:7,8;51:2;75:10; 106:1;135:9;166:14; 182:3;191:12;197:12 certainly (7) 58:1;59:22;88:22; 115:13;142:10; 159:16;199:7 certainty (1) 63:8 cetera (3) 23:3;58:3;101:23 CFO (1) 110:24 chain (3) 184:8;187:1,3 chairman (10) 21:18;25:11;57:8, 17;58:10;60:10;61:8; 98:11;109:21;111:6 challenges (1) 79:8 challenging (1) 83:8 chambers (1)	202:6 chance (1) 163:7 change (9) 44:15;86:13;99:6; 120:23;122:6;126:3; 160:9;190:20;194:11 changed (14) 23:1;24:22;59:3; 67:23,24;68:12,12; 72:14;110:21;113:3; 164:6,6;194:6,8 changes (4) 24:22;68:1;70:9; 149:9 changing (2) 79:12;121:2 Chanin (2) 158:2,4 channels (1) 60:17 Chapter (17) 20:8;24:23;26:4; 27:20;28:1,12,13; 29:17;30:13;40:9; 54:2,25;66:8;170:12, 13,16;202:23 characterization (1) 39:7 characterize (1) 66:5 characterized (4) 53:20;176:15; 192:2,3 charade (1) 67:12 Charles (10) 31:15;39:18;40:23; 41:1;45:2;46:16; 53:18;70:10,14; 185:25 Charlie (17) 32:5;38:22,23; 45:19;46:2,4;50:14, 15,17,19;51:5;60:22, 23;61:5,6,13;134:10 Charlie's (3) 60:25;61:1,4 Chase (1) 4:21 cheaper (2) 165:2,7 check (5) 21:22;58:24;165:9; 191:1;193:10 checked (5) 21:24;24:21;57:14; 186:9,11 checks (1) 57:19 cheek (1) 31:12 chief (11)	109:21;110:1,3,4, 19,22;111:2,5; 113:15;126:20;129:5 child (1) 105:9 chill (1) 198:22 chilled (2) 197:6;199:2 chilling (2) 161:18;197:11 chip (1) 47:4 choice (2) 27:6;68:3 choices (2) 68:4,4 choose (1) 55:2 chronology (1) 197:10 Circuit (2) 88:14,15 circulating (1) 198:5 circumstances (3) 21:11,12;190:18 cite (3) 85:4;88:13;98:19 cited (1) 94:6 Citibank (1) 88:14 citing (1) 81:2 City (2) 5:22,23 claim (26) 16:2,6,10;73:20, 24;74:1,25;76:5; 77:21;84:20;88:6,23; 89:18,23;90:6;100:5, 9,11,25;101:7,13; 104:13,16,20;106:14; 108:2 claiming (1) 145:4 claims (8) 16:4;29:21;73:18; 88:6;90:8;105:5,6; 107:11 CLAPP (1) 9:6 clarification (3) 18:23;118:12; 171:4 clarify (1) 182:21 clarity (1) 147:8 class (10) 33:10;54:19,22; 70:17;131:3;162:6,9,
--	--	--	---	--

15;193:20,20	collateral (3)	127:1,6,17,21;141:2,	164:17	confident (1)
Clause (1)	26:12;192:21;	6;158:5,7;159:17,21,	complies (1)	107:23
88:16	195:12	21,22;177:13;191:13,	83:18	confidential (2)
clean (2)	colleagues (3)	14,15;194:3	compliment (2)	61:21;62:9
48:12;205:5	186:18;195:24;	company (84)	26:1;27:19	confidentiality (2)
clear (16)	198:13	25:4;26:9;27:21,	complimented (2)	138:21;166:20
11:13;28:7;35:10;	collectively (2)	23;32:8,10,20;33:7;	26:17;29:15	confidentially (1)
48:8;76:23;79:21;	31:21;99:24	34:2,4,5,22,25;38:6,	compliments (1)	62:2
84:5;85:20;88:21;	college (5)	11,15,17,22,24,24;	40:8	confirmable (1)
89:2;92:19;93:1;	60:20;111:13,16,	39:2,4,5,21;40:11;	comply (2)	107:6
135:13,14;136:18;	21,22	44:23;46:17;55:2,4,	76:9;83:19	Confirmation (7)
139:4	combination (1)	9:59:2;60:15,16;	component (5)	2:2;12:5;30:14;
Clearly (4)	28:16	62:5,6;64:18,21;	113:1;115:1;	101:3,5;202:23;
51:12;84:7;188:9,	combine (1)	65:15;67:7;72:12;	118:14,22;121:24	203:6
17	39:21	78:23;79:7,16;81:18;	comport (1)	confirmed (4)
ClearPar (1)	comfortable (2)	85:2;87:2,7;88:3;	66:21	19:1;62:25;76:10;
71:11	10:8;103:23	91:13;93:21;96:22;	Conaway (1)	132:16
ClearWire (11)	coming (6)	97:9;98:9;113:8,23;	15:11	confirming (1)
52:5,7;67:6,11,20;	19:10;63:14;72:11,	114:1,9;128:7;	conceal (1)	102:24
68:3;92:4;113:24,25;	11;136:10;157:24	134:12;135:15;	88:7	confirms (1)
114:1,5	comment (3)	137:10;146:25;	concepts (1)	87:22
CLERK (2)	134:14,18;193:24	147:7;155:7;157:10;	79:17	conflict (3)
108:18;156:23	comments (3)	158:2;162:10;	concern (2)	92:9;93:2;100:21
client (1)	132:8;133:8;	163:20,24;165:24;	122:23;138:4	confuse (1)
49:9	134:18	169:23;170:3,8;	concerned (3)	30:5
clients (5)	commitment (2)	174:11;177:6;178:1,	107:3;136:22;	confused (1)
55:25;70:21;	124:4,7	1;180:5,13;192:8;	187:20	71:10
103:15,23;114:8	commitments (1)	195:17;199:5,9,12	concerns (3)	confusing (1)
clips (1)	131:3	company's (9)	122:5;177:16;	130:21
103:6	committed (2)	72:24;147:2;	204:8	confusion (2)
close (8)	41:10;103:10	161:12,17;162:4,7,	concerted (1)	28:12;137:13
22:15;51:10;61:11;	committee (32)	11,14;181:20	52:21	congratulating (1)
71:4,16,16,17,17	11:7,13;12:14;	compared (1)	concessions (1)	26:8
closed (5)	30:18;45:23;46:23;	104:1	152:10	congratulations (1)
29:25;63:17,21;	48:16,21;68:21,22;	compelled (1)	conclude (2)	26:6
70:25;95:2	72:4,7,14,19;78:1,18,	56:1	36:14;204:11	connect (2)
closely (2)	19:90:23;92:7,10,14,	compensation (2)	concluded (2)	189:7;192:10
115:11,15	19:99:14;105:17;	37:23,24	51:5;205:10	connecting (1)
closer (1)	106:6,9;158:17,17,	compete (2)	concludes (1)	189:6
110:17	18,18;196:8,12	112:12;165:4	138:14	connection (11)
closing (2)	committees (7)	competing (2)	conclusion (3)	14:12;25:14;26:16;
23:20;25:11	66:17,18;78:24,24;	113:19;165:2	104:9;138:10;	45:20;48:15;77:9;
co- (1)	158:12,14,16	competitor (22)	144:8	88:8;131:19;144:24;
110:21	common (3)	30:20,22;34:23;	condition (1)	202:22;204:22
coat (1)	134:8,17;144:7	62:21;63:3;86:14,16,	135:22	consensual (4)
10:14	commonly (1)	17,25;161:10,15;	conditional (1)	103:18;130:6,12;
co-chief (2)	122:9	163:10;165:23;	120:20	152:11
110:23,25	communicated (1)	166:7,11;176:8;	conditions (3)	consensus (1)
codified (1)	47:20	177:2,5,10;180:4;	120:10;173:14,19	107:6
55:10	communications (2)	197:7,8	conduct (11)	consent (1)
coffers (1)	112:11;134:22	competitors (6)	11:18,20,24;13:7;	93:18
193:11	community (1)	20:19,21;24:16;	21:9;30:3;59:10,17;	consequence (1)
co-head (2)	103:7	127:21,22;173:13	73:3;90:2;93:11	73:1
157:14,16	companies (49)	complaining (1)	conducted (2)	consequences (1)
Cohen (5)	14:7;20:8;23:24;	71:2	58:6;106:23	14:9
181:15,16,24;	29:9;32:6;33:19;	complaint (4)	conducts (1)	conservatively (2)
184:11,12	40:24;56:7;57:8,9,	16:3,18,19;74:6	60:15	35:25;36:6
cold (1)	11;58:19;60:11;61:9;	completed (1)	confer (1)	consider (7)
55:25	64:22;67:4;69:22,22,	96:20	139:3	32:16;34:23;35:1,
co-leading (1)	24,24;76:8,10;87:20;	completely (4)	conference (2)	16;92:8;141:12;
157:19	114:21;116:24;	14:23;36:2;49:7;	39:10,11	162:16
co-led (1)	117:20,21;118:6,8;	80:1	conferring (1)	consideration (2)
158:9	119:15,20;126:25;	complexity (1)	203:22	76:11;177:18

considered (2) 41:7;176:17 considering (2) 14:4;92:2 consistent (2) 114:19;152:12 consolidated (1) 193:5 consolidation (1) 56:13 conspiracy (4) 68:17;70:1;83:3; 91:7 constantly (1) 79:12 constituent (1) 170:13 constituents (6) 11:9;12:13,17,19; 130:7;170:15 constrained (1) 195:15 construct (1) 141:18 construction (1) 119:21 consultant (4) 50:15,15,18;52:13 consulting (1) 114:7 contact (1) 82:19 contained (1) 71:20 contains (1) 126:5 contemplate (1) 12:6 contemplated (1) 12:8 context (1) 56:13 continually (2) 24:20;114:19 continue (2) 25:2;97:19 continued (2) 25:6;103:20 continues (3) 59:18;76:17;126:8 continuing (3) 14:3;136:15; 177:22 contract (44) 20:12;44:6,7,9,14, 16;70:8;75:21,22,24, 25;79:15,18;80:16, 25;81:10,23,25,25; 82:3,18,24,25;83:6, 12,16;84:9,20,25; 85:1,21;86:1,24; 87:24;88:1,19;89:9, 14,21;100:5,16,17;	107:9;108:2 contracted (1) 40:18 contracts (1) 83:11 contractual (6) 46:22;80:2;172:22; 173:3,7;174:7 contractually (1) 173:23 contrary (4) 75:13;93:7;104:22, 24 contrasted (1) 163:20 control (18) 21:2;25:12;27:20; 28:1;38:17,18;45:10, 14;65:16;66:2;87:22; 99:1,1;107:17;120:9, 24;160:9;197:21 controlled (7) 20:7,16;27:15; 36:18;40:23;84:8; 85:5 controlling (5) 20:9;25:3;85:7,9; 102:12 controls (3) 29:5;45:9,11 convention (1) 166:23 conversation (4) 175:13;178:20,21, 23 conversations (10) 56:24;57:2;130:20; 142:15;144:25; 150:18;169:25; 195:10;199:12,16 conversing (1) 11:8 convince (6) 23:18;28:6;162:1; 163:12;164:12; 170:14 convinced (1) 163:8 cooperating (1) 155:8 coprimary (1) 119:8 copy (3) 126:9;143:6;146:7 copycat (1) 107:4 corner (1) 191:6 corporate (18) 20:20;21:21;22:16; 27:1;36:9;56:14; 58:2;59:5,11,14; 60:13,15;79:10;	90:16;94:18;97:7; 98:12;158:4 corporation (3) 85:5;98:6;185:25 corporations (1) 45:7 corporation's (1) 95:16 correctly (1) 114:2 correlation (1) 125:8 correspondence (1) 82:8 cost (1) 162:25 costs (1) 39:1 counsel (15) 19:2;21:25;26:25; 47:16;58:22;62:15; 87:16;92:15;96:22; 136:14;139:3;145:4; 186:4,13;187:24 counsel's (1) 193:24 count (2) 71:5;171:16 counted (1) 80:22 counter-facts (1) 78:13 counter-inference (1) 78:13 counterparty (1) 71:15 country (1) 78:23 couple (14) 28:20,24;40:21; 43:16;49:13,16,24; 139:25;140:2;150:1, 22;151:4,7;179:22 coupon (1) 26:11 course (11) 32:1;33:18;56:1; 57:4,23;60:4;67:24; 77:6;106:5;132:1; 152:1 COURT (300) 10:2,17,20,23,25; 12:16;13:2,12,15,17, 22;14:1,14,16,21,24; 15:3,6,20,23;16:9,11, 13,21,24;17:1,4,7,18, 25;18:2,6,19,21,24; 19:4,7,9,13,16,19,22, 25;28:25;31:6;32:21; 33:2;41:20,23;42:1,4, 7,10,18,21;43:4,6,9, 11,25;44:4,19;51:13; 53:13,16;55:14;	57:16,19,22;58:1,5, 21,25;63:14,15;65:4, 21;68:19;69:6,9,19; 71:18;73:6,9,15; 74:19,22;75:4,9,17; 77:23;79:19,21;80:5, 7,8,15;81:4;82:1,2,3, 4,24,25;83:9;84:4; 87:25;89:3,12,22; 90:1,25;92:18,23; 94:2;95:6,10,18,22, 25;96:3,7,12,14,16; 97:4,7,13,16;98:20; 99:23;100:2;101:4,9, 21;104:15,22; 105:15;106:22; 108:5,11,19,25; 109:2,4,7,11,16; 110:2,16;111:12,20; 112:20;115:21; 116:14;118:2; 123:22;124:15,20; 126:16;127:10,12; 129:17,18;132:12,23, 25;133:4,12,14,19; 134:4;135:11,16; 136:2,4,6,15,20,23; 137:4,7,17;138:16, 19,23,25;139:2,8,11, 15;143:13,15;146:13, 22;150:2;153:9,25; 154:1,3,20;155:17, 20,23;156:1,4,6,8,11, 17,19,24;157:3,6,23; 159:3;160:18;161:2; 164:5,11;165:12,14; 166:23;167:1,4,6,8, 12,15,17,20,23; 168:3,10,12;169:11, 14;170:15;171:3,7,9, 11;180:16,19;181:2, 5,7;184:1,5,16,20; 185:1,11;187:13; 188:7,14,20;189:6,9, 13,15;191:23;192:1, 10;193:13;194:24; 195:1;197:9;199:24; 200:1,4,6,9,12,15,22; 201:1,2,4,13,17,22; 202:1,8,17,20;203:2, 7,9,15,19,24;204:2,9, 16,18,25;205:2,5,9 courthouses (1) 78:23 courtroom (9) 40:15;93:8,14; 97:15,16;155:21; 167:19;168:7;170:14 courts (2) 83:10,10 Court's (2) 13:20;195:4 coverage (2)	110:11,11 cram (1) 171:22 cram-down (4) 172:2,4,8,9 crammed (1) 65:17 crazy (1) 52:20 create (4) 24:8;48:24;49:6; 137:13 created (2) 30:1;130:22 creates (2) 53:5;122:5 credibility (2) 53:7;60:1 credible (3) 28:17;36:4;46:15 credit (17) 20:20;22:1;23:9; 24:15;29:24;55:9; 76:2;80:6,7;82:11; 84:22;86:4;88:2; 90:5;104:15;126:25; 150:8 creditor (6) 54:16,19;63:3; 170:16;171:12,25 creditors (11) 54:8,15,19;76:23; 107:3;147:24; 148:13,24;170:20; 172:7;194:18 creditor's (1) 54:16 critical (1) 11:16 critically (1) 28:23 CROMWELL (11) 7:18;15:18;21:24; 22:4,6;32:2,5,9,12; 73:10;189:18 cross (2) 156:12;204:17 cross-checked (1) 186:3 cross-exam (1) 138:21 cross-examination (6) 46:13;138:16; 139:19;150:3; 165:15;189:19 Crown (1) 5:21 crux (1) 44:7 crystal-clear (1) 78:3 Cullen (2) 26:25;78:4
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curious (1) 47:15	119:18	182:14;186:12	166:21	desire (2) 24:1;62:8
current (2) 42:11;85:21	DBSD's (1) 120:16	debtors (13) 11:7,18;17:12,22; 19:2;28:13;53:25; 105:13,14;108:23; 179:12;187:20; 203:18	definition (1) 79:16	desired (1) 12:7
currently (4) 12:11;71:9;109:19; 125:10	De (2) 87:9;166:7	debtors' (2) 11:22;12:4	definitively (2) 55:19;154:16	despite (1) 62:8
cut (1) 73:5	deadline (2) 202:22,22	debtor's (3) 55:17;186:4,13	degree (2) 111:15,17	detailling (1) 71:14
cuts (1) 102:21	deal (21) 37:3;43:2;54:5; 63:11;72:20,25; 76:25;77:10;78:16; 79:1;84:12,12;92:11; 102:15;103:18,25; 104:3;107:15;131:3; 148:17;202:15	debts (1) 131:8	degrees (1) 111:14	details (5) 141:22;169:24; 173:2,11;179:15
D	dealing (2) 126:12;204:11	DebtWire (2) 197:16,18	delay (2) 23:20;28:11	determination (2) 105:18;106:10
D-340 (2) 148:5,6	deals (1) 92:5	decades (1) 162:2	delayed (2) 28:3,5	determine (2) 55:19;119:4
Daigle (1) 15:10	dealt (2) 23:18;122:6	decide (3) 82:2,3;203:12	demerit (1) 100:3	determined (1) 65:8
damage (3) 56:10;75:1;102:11	DEBORAH (1) 5:8	decided (6) 68:10,11;69:3,5; 103:12;174:11	demonstrably (1) 31:13	developed (2) 66:9;97:24
damaged (2) 55:20;101:17	Debt (142) 15:12;20:9,14,17; 21:4,19,23;22:1,4,8, 14;23:13,17,23;25:3; 26:1,3,10,15,17,19, 22;27:3,18,19;29:15; 30:5,8,11,12;31:16, 20,23;32:13,16;34:8, 19,22;35:13;36:2,8; 37:20,23;38:10,25; 39:24;40:7,11,18; 42:13;45:2;46:21,23; 47:19;48:3,19;50:3; 51:4;54:10,11;57:15, 20;58:8,14;61:23; 63:22,24;64:14,15, 17;65:9,15,24;66:3, 17;69:23;70:3;71:22; 72:9;76:16,17;77:7, 12,17,18;78:2,7,11; 79:3;83:24;87:5,6,6; 88:11;90:25;91:3,25; 92:12,24;93:6;94:23; 96:1,24;99:3;102:7, 25;106:10;128:2,7,9, 14;130:21,24; 131:24;132:17; 134:11;135:9; 137:12;147:2,15; 149:4;153:14,17,24; 154:7,17;161:11; 162:4,11;164:21; 165:6;166:8;181:21; 182:15;193:11,15; 194:14;197:15; 198:7,8,15,21	deciding (1) 98:7	demonstrate (2) 75:2;133:20	development (3) 21:21;27:1;118:25
damages (16) 56:8;63:2,10;76:4; 88:17;100:25;101:1, 1,6,7,10,11,14,24; 104:5;108:3	debtor (11) 54:5,16;102:11; 166:12;171:18; 176:12,13,16;177:10;	decision (11) 27:16;87:23;92:16, 22;93:25;121:10,11; 123:11;152:24; 162:22,25	demonstration (1) 11:18	developments (1) 203:11
dark (1) 52:9		decisions (2) 115:13;121:2	Dena (1) 2:20	device (4) 116:9;120:13,16, 17
data (1) 39:16		declaration (4) 185:3,11,23;186:5	depending (1) 14:12	devices (2) 120:21,21
date (7) 44:13;71:13,15; 115:17;127:15; 143:18;203:2		decline (1) 55:23	depleted (1) 36:2	dictionary (2) 70:9;85:7
dated (3) 150:9;182:1;187:5		default (1) 33:12	deploying (1) 43:1	difference (6) 65:25;74:20;77:24; 110:7;123:9;193:4
dates (2) 64:3;204:23		DeFazio (2) 126:6;127:13	deployment (1) 114:20	different (24) 21:13;22:20;44:1; 53:10;65:5,24;68:5; 75:4;83:19;90:19; 101:21,23;111:23,24; 112:22;113:3; 122:14;132:12; 174:12;190:9;191:5, 10,17;197:16
daughter (3) 35:23;77:3;78:15		defeat (1) 100:10	depositions (2) 69:13;90:22	differentiation (1) 11:25
daughter's (7) 35:19;36:7,16,20; 47:1,2;99:3		defend (1) 48:25	Derrough (20) 19:13,14;157:2,3, 9;160:11,13,20; 161:7;165:17,22; 168:2;169:11; 181:15;185:3;189:1, 3,21;200:1,15	difficult (6) 56:14;59:18;124:1; 131:4,4;163:17
DAVID (3) 6:7;9:9;31:8		defendants (5) 22:6;23:18;26:13; 27:11;155:1	Derrough's (1) 160:24	DIP (1) 204:22
day (14) 41:3;49:11;50:21; 51:2;52:10,17,23,24; 61:14;83:20;153:11; 163:9;182:23;204:10		defendant's (7) 75:22,23;148:3; 153:6;154:12; 182:22;184:2	describe (3) 118:2;123:6; 140:24	DIRE (1) 157:7
days (10) 28:20;40:20;49:14; 50:13;127:19; 139:25;150:22; 151:4,7;165:19		defined (1) 81:20	described (1) 111:9	direct (12) 20:19,21;78:3; 109:14;128:24; 138:14;161:5;188:9, 12,21;196:2;204:14
day-to-day (3) 175:11;186:19; 198:3		defines (1) 61:14	design (2) 112:8;114:20	direction (2) 58:17;129:8
DBSD (13) 64:11,12,13,20,22; 67:1;91:20;117:10, 21,22,25;118:4;		defining (1) 86:17	designated (2) 116:4,7	directly (5) 21:4;24:24;82:12; 169:10;194:18
		definitely (3) 50:17;51:23;	designation (1) 115:22	director (5) 26:25;45:17;
			designations (1) 115:24	

112:23;157:14,16 directors (16) 27:10;37:2;41:16; 44:24;45:13;47:15; 64:25;78:17;92:8; 94:17;126:17,23; 127:13;142:16; 150:16;152:21 directorships (1) 152:20 DIRECTV (2) 116:23;117:3 dirty (1) 54:14 disagrees (1) 202:2 disappointment (1) 134:19 disclose (1) 155:6 disclosed (3) 29:21;96:19; 129:17 disclosure (5) 54:7,8;57:12; 60:17;64:14 disconnects (1) 53:22 discount (2) 164:21;165:2 discovered (1) 77:5 discovery (15) 23:5;69:12;74:9; 10,10;76:10,23;77:6; 80:17;85:13;90:17; 99:7;107:12;203:17; 204:7 discuss (4) 57:5;60:23;106:21; 183:11 discussed (4) 142:2;151:10,18; 179:2 discusses (1) 148:11 discussing (2) 140:6;142:6 discussion (13) 27:16;35:6;50:22; 108:9;132:20,21; 134:17;141:1;144:1, 24;145:16;178:9,15 discussions (19) 14:4,7;103:20; 132:13;135:2;140:9; 144:17;145:17; 147:1,2,6,23;155:9; 169:16;183:15,18; 201:10;202:25; 203:21 Dish (222) 7:19;11:18;14:4;	15:18;16:5;20:7,16, 24;21:3,19,21,22,25; 22:16,18,23;23:6,19, 23;24:1,4,8,9,12,14, 17,23;25:4,10,12,19, 22,25;26:3,16,20,22, 25;27:1,9,17,22;29:5, 8,9,12,13,14,22,25; 30:15,25;31:25;32:1, 11,13,17;33:13;34:2, 13,14,23;35:1;36:18, 19;37:16,16,16,24; 39:11,12,14,17,22,22, 25;40:6,12;41:1; 44:9,10,23;45:2,17, 20;46:7,18,24;47:16; 48:12,18;49:1,3,4,11, 17;51:25;57:20;58:7, 10,11,22;59:8;60:11; 61:12;62:14;64:7,9, 12,13,13,14,14,17,21, 25,25;65:10,10;66:2, 14,15;67:1,4,18,22; 68:10,15,22;70:2; 73:11,18;74:18;76:7, 12,15,25;77:11,15, 21;79:3,13;81:24; 82:10,20;85:8,10; 86:10;87:9,19,24; 88:5;90:10,12,16; 91:4;92:2,7,11;93:5, 15;94:8,11,22,25; 96:24;97:5,6,25;98:8, 11,15,17,24,25; 99:13;100:6,7,9,14, 15;104:14;105:6,20; 106:1;107:2;108:1; 114:23;115:10,23; 116:11,16,22;117:2, 5,24;118:4;119:16, 18;120:1,5,23; 121:20;122:1;123:1, 12,17,23;124:4,22; 125:1,5,10,16,19,20, 23;149:21;150:5; 182:14;185:25; 189:18 DISH/EchoStar (3) 23:2,3,8 DISH/Ergen (2) 193:2;197:14 DISH's (19) 21:24;25:7,13,13, 14;26:25;27:25; 44:11,11;65:1;67:7, 10,25;82:8;98:12; 115:2;116:18;122:4; 149:13 dismiss (7) 74:1,3,4,5;76:7; 80:14;90:19 dismiss-land (1) 99:8	disposal (2) 18:14;63:10 dispute (3) 16:25;23:16;98:8 disqualified (15) 32:8,10;79:16; 81:5,18;85:2;87:2,7, 19;88:3;126:24; 127:1,6,17,20 dissuade (3) 190:24;191:16; 196:18 dissuaded (4) 189:24;196:16,22; 198:8 dissuades (1) 191:3 dissuading (1) 161:19 dissuasive (1) 165:9 distinction (2) 97:19;193:3 distract (2) 30:12;32:23 distress (1) 194:3 distressed (11) 20:8;24:13;25:23; 27:14;34:19,22;36:8; 158:5;159:7;160:11; 161:23 district (1) 21:10 diversified (3) 36:1,6;47:5 divert (1) 79:10 division (4) 112:2,3,4;113:16 doctrines (1) 58:2 document (9) 41:7,8;74:10; 146:7;153:5;155:1,3; 181:14;184:18 documentation (1) 127:3 documents (7) 22:16;24:15;28:8; 64:2;76:24;80:21; 90:20 Dodge (3) 47:16,18;78:4 dogs (2) 191:5,8 Dolan (1) 50:16 Dolan's (1) 56:5 dollar (6) 27:23;29:20;41:1, 10;106:1;162:9	dollars (33) 22:13,21;27:14; 29:3,19;33:23;34:1, 10;35:18;36:5;37:19, 20,22;38:10;39:24; 40:18;42:13;48:3; 55:21;56:8;62:22; 63:2,10;76:14,14; 95:19;103:14;105:7; 124:6;142:4;149:7; 165:3,7 dollars' (1) 165:5 dominated (1) 27:9 done (24) 20:12;31:2;35:22; 36:15;37:15,15;39:3; 65:6,6,10,10;72:20; 77:13;81:3;91:2,10; 100:4,23;106:4; 122:13;163:19; 189:11;200:7;204:12 DONTZIN (2) 9:2,7 door (2) 29:25;54:4 doorstep (1) 22:19 do-over (2) 14:18;15:2 DOSHI (1) 8:8 dots (1) 189:7 double (3) 135:17;136:19,21 doubt (1) 164:17 Doug (1) 52:12 Douglas (1) 109:5 down (14) 53:22;54:4;55:5; 59:25;64:16;84:5; 85:12;92:13;104:4; 105:22;116:9; 171:22;182:23; 200:15 downlink (18) 116:8;121:24; 122:3,3,7,10;123:7,9, 14;124:10,12,16,23; 125:3,5,14,20;149:17 downside (5) 70:13;76:19;77:4, 4,6 dozens (2) 159:13,13 draft (5) 41:5;82:23;83:15; 86:4,15	drafted (2) 84:6;107:20 drafting (10) 80:21,25;83:16; 84:5;85:16,20; 107:19,20;150:8,12 dragon (1) 71:9 drastic (1) 90:4 draw (8) 74:6,23;75:13; 77:25;78:5,10;97:19; 126:5 drawn (1) 68:24 drive (1) 164:4 DUBLIN (6) 5:7;203:21,25; 204:3,3,21 due (1) 15:24 duopoly (1) 112:13 during (29) 21:17;54:2;67:14, 23;76:1;102:24; 103:5;112:1,14,21; 114:15;130:4,9,11, 20;131:7,15;132:13; 133:7;134:9,14,22; 135:10;137:17; 140:9,10;145:11; 158:11;175:1 dust (1) 65:2 duties (8) 57:11;58:2,3;97:9; 110:25;112:15; 157:16,20 duty (10) 54:9;55:21;57:12, 12;88:24;172:22; 173:3,7,20;174:8 dynamic (2) 164:22;165:9
E				
e- (1) 184:12 earlier (13) 10:5;38:13;40:22; 42:7;49:12;93:24; 113:19;190:23; 196:21;197:5;198:2, 4,12 early (6) 49:25;65:8;119:13; 140:4;145:7;172:16 earth-based (1) 110:14				

ease (1) 59:19	197:3;202:3	encountering (1) 133:7	entity (8) 27:14;29:5;40:22; 54:12;55:11,15;84:8; 128:1	105:25;106:8,13; 129:20,23;132:17,19; 137:20;138:12; 139:18;144:24; 153:13,17,20,22,24; 154:7,17;180:11; 182:11,14,16;183:8; 184:13;185:25; 190:1;198:14,21; 200:23,24
easier (1) 185:6	ELBERG (1) 4:6	encourage (2) 10:6;183:22	environment (3) 42:14;190:9,11	Ergen/DISH (1) 197:20
easiest (1) 123:6	electrical (1) 111:16	end (9) 14:17;42:4;52:23; 79:22;120:7;146:14, 16;163:9;203:10	episode (3) 17:24;20:6;47:13	Ergen's (27) 25:18;27:4,18; 28:17;30:25;32:14; 35:17,19;37:21;40:7; 46:25;49:21;62:12; 77:7;91:4;92:12; 94:9,16;99:8;107:14; 132:9,14;135:8; 137:11,12;180:2; 199:2
East (1) 7:12	element (2) 84:20;90:7	endeavors (1) 144:13	equal (1) 119:10	ergonomics (3) 31:12,12;43:11
easy (1) 162:24	elements (5) 75:20;76:5;90:8; 100:24;108:1	ending (2) 78:6;143:20	equate (1) 192:8	eScribers (1) 2:21
EchoStar (73) 7:19;15:18;16:5; 20:7,16,25;21:3,19, 22,25;22:23;23:6; 24:9,18,24;25:4,10, 13,25;29:14;32:8,8, 11,13;34:2;57:19; 59:9;60:11;70:3; 73:11,19;74:18;76:7, 14,16;77:1,11,16,21; 79:3,13;81:24;85:8, 11;86:10;87:9,20; 90:10,13,16;91:4,8, 15;93:16;94:23,25; 96:24;97:5;98:16,17, 24;99:1;100:9;105:6; 107:2;108:1;116:22; 117:3,5,15,24;150:6; 189:18	elephant (1) 80:3	ends (2) 81:3;84:18	equation (1) 97:24	especially (5) 12:11;26:16;55:1; 57:4;192:20
EchoStar's (4) 22:16,18;25:19; 27:9	eleven (1) 152:21	engage (6) 14:3;54:9;79:1; 95:19;187:14;199:12	equitable (4) 11:25;16:4;89:18; 90:2	ESQ (27) 4:6,14,15,16,17,25; 5:7,8,17,25;6:7,8,9, 17,18,19;7:7,15,23, 24,25;8:8,17;9:6,7,8, 9
economic (3) 28:6;85:11;103:24	eliminate (1) 124:16	engaged (4) 94:8;95:1;98:15; 131:22	equity (19) 20:17;30:5;38:7; 51:25;54:20;141:12, 14,18;142:3;149:1,7; 151:16,20,25;152:3, 4;158:6;178:12; 192:17	essence (1) 133:24
economics (4) 99:6,6;103:22,23	Ellis (2) 108:8;203:17	engagement (2) 18:14;201:8	equivalent (1) 125:22	essentially (10) 45:19;90:15;113:1; 119:10;121:11; 122:25;126:24; 138:2;141:19;164:23
educational (1) 111:12	else (19) 17:8;18:3;19:3; 30:11;46:1,3;49:11; 59:7;64:2;91:13; 99:18;135:4,15; 136:25;137:1;173:9; 192:24;203:15; 204:19	engagements (1) 114:10	ERGEN (215) 2:5;20:2,6,15,25; 21:5,13,18;22:4,7,11; 23:11;24:10,13;25:2, 5,11,25;26:6,8,12,17, 21,24;27:3,6,10,18, 23;28:19,25;29:2,14, 18,20,25;30:4;31:15, 20,22;32:6,10,12,18; 33:6,11,16,21;34:3; 36:5,14;37:6,17,21; 38:9,22,23;39:8,10, 18,23;40:23;41:1,14; 42:12,25;44:8,9;45:2, 9,11,11,14;46:6,7,9, 16;47:14,18,20;49:1, 11,13,15,16,18,20,23, 25;50:1,3,13,23;51:5, 9,11,17,18,21,22,24, 24;52:6,7,11,17,18; 53:18;57:14;59:8,12; 60:5,10,19;61:10,18, 24;62:8,25;63:25; 64:7;66:1;68:11; 69:1;70:2,4,7,10,14; 71:7,22;72:19;75:1, 7;76:15,17,18;77:1,1, 16,21;78:15;79:1,3,4; 81:24;82:7,9;84:7,8; 85:12;86:19;90:15, 25;91:8,12,22;92:12, 20;93:15,23;94:7,11, 18,20,25;96:21; 97:15,25;98:3,8,11, 15,18;99:2;100:7,13; 101:19;102:6,10,13, 17,18,18;104:6;	establish (4) 27:24;54:23; 122:25;167:23
effect (4) 162:19;164:19; 177:13;190:14	e-mail (39) 38:12,13,13,16; 47:25;49:16,18; 50:13,21,25;71:14; 72:17;102:21;126:6, 9,12,17;127:3,13; 148:8,11;154:12,13; 181:15;182:1,17,19, 20,23;184:10;187:3, 4,6,17,18;188:23,24; 189:1;202:6	engineering (7) 111:16;112:7,23, 23,24,25;113:11		established (3) 23:8;35:19,22
effective (2) 13:25;123:12	e-mailing (3) 49:14;56:22;102:5	enjoin (1) 71:3		establishes (1) 28:16
effectively (2) 123:19;165:3	e-mails (18) 23:3;25:13;37:16; 49:16,24;50:1,4,8,9; 51:13;52:17;56:21; 62:16;70:24;153:7; 182:16;184:8;187:1	enjoyed (1) 112:4		estate (6) 37:4;55:17,20; 60:25;130:17;159:20
effort (6) 23:20;52:21; 131:19;163:4;193:6; 199:11	embarked (1) 113:20	Enos (1) 15:11		estates (3) 11:22;21:8;196:9
efforts (5) 130:5;131:13; 145:6,11;163:6	emphasis (1) 41:19	enough (9) 46:13,22;54:18; 60:23;85:22;103:13; 164:11;193:14;194:4		estoppel (1) 101:22
ego (1) 56:15	employ (1) 20:7	ensure (3) 76:11;147:9;172:1		et (5) 2:5,5;23:3;58:3; 101:22
egregious (1) 73:3	employed (7) 25:10;109:17,19, 22,24;114:21;157:9	enter (1) 163:1		evade (1) 46:22
Ehmer (1) 15:10	employee (2) 113:25;114:11	entered (4) 165:23;166:11; 172:12;174:17		evaluate (1) 66:20
eight (3) 39:25;42:2;56:7	employment (4) 93:13;111:8,20; 157:23	entering (1) 127:23		
either (8) 18:11;30:22;36:9; 59:10;69:18;155:23;	encompassing (1) 12:18	entire (3) 114:12;170:12; 187:3		
		entirely (4) 59:7;70:4,4;100:10		
		entirety (3) 184:9,17,19		
		entities (8) 20:7,13,16;22:23; 24:9;166:17,19; 197:20		
		entitled (1) 185:16		
		entitlements (1) 54:6		

evaluated (1) 84:15	124:19;131:25; 136:23;174:9;	existing (2) 39:13;112:10	eyes (1) 14:21	Fairness (3) 66:18;69:5;158:17
evaluation (1) 92:15	175:13;192:2;197:12	exists (1) 98:10	F	fait (1) 71:4
eve (1) 30:14	examination (8) 17:17;55:15; 109:14;138:15; 154:23;157:7;161:5; 188:10	exit (5) 131:14;140:6; 145:7,18;201:8	face (3) 20:12;83:2,4	faith (1) 130:15
even (43) 20:11;23:1;32:11; 35:15;24;37:17;39:3; 40:24;48:23;49:21, 22;51:4,25;53:3; 54:20;57:3;59:20; 68:6;70:24;71:24; 72:10,10;77:16; 80:25;81:22;82:25; 83:19;87:20;88:4; 93:22;101:19;103:9, 12;121:12;131:2,5; 135:14;164:10; 173:8,24;189:3; 194:17;199:16	example (4) 24:22;58:7,22; 74:25	expand (1) 79:15	faces (1) 79:8	Falcone (66) 48:1;49:9,25;50:1, 11,14,17;51:9,11,22; 52:2,2,3,11,16,25; 56:17,24;60:8;62:9, 12,15;63:6;72:17,23; 82:15;102:3,4; 103:21;148:8,20; 150:15,18,21;151:5, 9,15,18,22;152:1,23; 153:7,16,20,23; 154:6,15;178:3,5,8; 179:16;180:1,10; 181:15;182:2,10,24; 183:2,3,8,11,15,18; 184:6;190:2;198:18
evening (1) 205:3	exceeded (1) 95:2	expect (2) 67:6;104:21	facilities (2) 202:18	Falcone's (8) 52:5;56:19,21; 67:9;178:14,17; 179:4,6
event (2) 30:24;69:19	Excellent (2) 20:4;108:11	expectation (1) 38:7	facilities (2) 23:3;25:14	fall (3) 24:24;64:1,4
events (4) 13:8;40:16;197:10; 199:8	Except (2) 53:25;166:17	expedition (2) 50:6;55:16	facing (1) 16:14	falls (1) 46:8
eventually (2) 23:12;117:24	exception (1) 19:10	expense (1) 175:4	fact (57) 27:11;32:15;35:21; 39:10;45:22;55:20; 61:15;62:20;67:20; 69:11;71:1;73:22; 74:13;75:1;77:25; 78:10;79:25;80:8; 82:7,16;85:10,20; 88:6,7,23;89:8;91:5, 8,20;92:14;94:1,7; 95:10;96:4,21;98:19; 99:13;101:15; 106:17;107:21; 129:11,23;133:8,8, 24;144:21;147:20; 150:23;151:1,19; 152:14;177:5,16,19; 188:10;198:24; 199:22	false (1) 108:10
everybody (4) 49:11;52:10,21; 181:5	excerpt (1) 184:7	expensive (1) 165:3	factors (1) 177:9	familiar (8) 60:24;111:9; 116:11;131:13; 164:15;185:9;194:4; 198:11
Everybody's (1) 74:22	exchange (1) 141:14	experience (5) 112:1;162:2;163:5; 178:11;190:5	facts (21) 21:16;23:15;27:24; 29:6;42:11;49:6; 59:25;60:3;66:11,22; 73:2,2;74:7,16; 75:12;78:25;85:25; 90:24;108:13; 180:14,17	familiarity (2) 114:23;115:1
everyone (5) 10:4;64:19;72:4; 108:20;181:7	exchanged (3) 38:6;182:16; 184:12	expert (8) 158:19;159:4,5,8; 160:11,25;161:3; 198:20	failed (5) 22:23;23:9;31:1; 103:4;177:1	families (1) 60:22
evidence (73) 15:25;16:1;20:23; 22:22;23:7,22;24:3, 19;25:7,17;26:5,20, 22;28:4,7;29:24; 31:3,14;36:3;38:23; 57:23;59:24;60:3; 66:24;73:17;74:16, 22,23;75:3,12,20; 76:15,25;77:10,15, 19;79:2,10;80:20; 81:2;82:7,13,19;83:2, 4,8;85:10,13;87:8,18; 88:4;90:10,12;91:17, 24;92:1,18;96:19; 98:25;99:6;102:1,23; 104:5;107:12;127:9, 14;135:13;136:1; 143:12,17;146:12; 180:15,17	exclusive (1) 131:16	expertise (7) 160:13,15,23,24, 25;179:5;193:22	family (5) 25:18;29:19,23; 37:6,7	family's (1) 99:2
eventually (2) 23:12;117:24	exclusivity (4) 54:2;71:5;102:25; 130:13	experts (1) 19:3	factual (4) 31:13,15;79:20; 188:23	fan (1) 43:1
everybody (4) 49:11;52:10,21; 181:5	excuse (1) 144:1	explain (9) 28:25;59:17;110:2; 162:3,8,10;173:18, 23;194:21	fair (5) 33:25;70:18;72:1; 115:16;164:14	far (10) 68:4,16,16,16; 69:24;81:22;93:10, 22;103:21,22
Everybody's (1) 74:22	excused (1) 155:18	explained (2) 38:3;76:7	failing (1) 43:15	FARR (3) 6:12;53:18;139:18
everyone (5) 10:4;64:19;72:4; 108:20;181:7	executed (3) 22:9;26:7;37:20	explored (1) 29:10	failsafe (1) 70:15	fashion (2) 131:1;141:21
evidence (73) 15:25;16:1;20:23; 22:22;23:7,22;24:3, 19;25:7,17;26:5,20, 22;28:4,7;29:24; 31:3,14;36:3;38:23; 57:23;59:24;60:3; 66:24;73:17;74:16, 22,23;75:3,12,20; 76:15,25;77:10,15, 19;79:2,10;80:20; 81:2;82:7,13,19;83:2, 4,8;85:10,13;87:8,18; 88:4;90:10,12;91:17, 24;92:1,18;96:19; 98:25;99:6;102:1,23; 104:5;107:12;127:9, 14;135:13;136:1; 143:12,17;146:12; 180:15,17	executing (2) 27:25;68:16	exposed (1) 111:24	failure (1) 79:7	fashioning (2) 11:21,24
eventually (2) 23:12;117:24	execution (1) 147:9	expressed (1) 144:7	fairly (1) 123:25	fast (1) 51:8
everybody (4) 49:11;52:10,21; 181:5	executive (11) 21:18;25:9,11; 37:2;58:10;60:10; 96:22;97:8;109:21; 111:2,5	extends (2) 116:2,7		faster (1)
Everybody's (1) 74:22	executives (1) 23:2	extension (2) 124:13;183:3		
everyone (5) 10:4;64:19;72:4; 108:20;181:7	Exhibit (15) 126:5;127:9,15; 142:22;143:17; 145:24;146:1,11; 148:2;153:6;154:13; 155:2;181:11; 182:22;184:2	extent (6) 31:18;76:22;98:23; 106:6;199:4;203:22		
evidence (73) 15:25;16:1;20:23; 22:22;23:7,22;24:3, 19;25:7,17;26:5,20, 22;28:4,7;29:24; 31:3,14;36:3;38:23; 57:23;59:24;60:3; 66:24;73:17;74:16, 22,23;75:3,12,20; 76:15,25;77:10,15, 19;79:2,10;80:20; 81:2;82:7,13,19;83:2, 4,8;85:10,13;87:8,18; 88:4;90:10,12;91:17, 24;92:1,18;96:19; 98:25;99:6;102:1,23; 104:5;107:12;127:9, 14;135:13;136:1; 143:12,17;146:12; 180:15,17	exhibits (2) 143:7;155:1	extra (1) 58:9		
eventually (2) 23:12;117:24	exist (3) 76:24;77:14,22	extrinsic (2) 81:2;83:8		
everybody (4) 49:11;52:10,21; 181:5	existed (2) 59:21;112:13	eye (4) 18:17;47:11; 162:13;203:12		
Everybody's (1) 74:22	existence (1) 98:12			

63:18	figured (1)	67:15	fluid (1)	forty-five-minute (1)
fatal (2)	193:19	firm (7)	12:23	18:11
80:12;107:10	file (7)	25:19;151:15;	flying (1)	forward (15)
fault (1)	54:10;55:3,4;	158:4,6;163:2,3;	49:12	11:15;12:5,25;
137:6	182:2;202:5,22;	192:7	focus (2)	15:8;51:8;83:7;
favor (3)	203:5	firms (3)	130:3;146:24	92:16;93:1;97:18;
74:8;174:8;194:12	filed (18)	69:4;84:2;164:1	focused (6)	100:6;104:10;
favorable (1)	59:2;61:20;120:8,	firm's (1)	16:9;31:11;68:15;	108:13;201:21;
105:19	19,23;124:3,3;	158:15	107:5;158:4,6	202:4;203:8
FCC (37)	127:19;152:12;	first (54)	focusing (2)	forwards (1)
67:9;68:2,6;72:21;	174:15;185:3,11;	12:16;22:14;24:11;	96:4,14	189:1
79:8;115:13;118:16,	186:6;188:16;	30:4;31:23;33:21;	folks (12)	found (2)
25;119:4;120:1,2,3,9,	192:21;201:7;	40:5,17;42:17,18;	10:3;15:7;18:6;	89:17,17
19,25;121:8,16;	204:22,22	43:12;49:13;53:24;	40:1;64:14,16;66:5,	Four (9)
122:15;123:11,17;	filing (3)	58:10;60:12,20;	15;99:20;129:2;	4:3;36:22;54:18;
124:1,9,23,25;138:3;	24:22;123:23;	62:15;64:4,5;65:14;	146:15;204:11	137:15;140:11,13;
141:16;144:8,17;	174:23	68:3;70:20;74:3;	follow (4)	142:8;144:3,17
149:16;177:16,19,21,	filings (1)	77:12;81:17;84:10,	115:8,11,15;195:4	frame (5)
22,22,23,25;190:1	69:18	20:95;1,2,7,13;96:5,	followed (2)	118:9;140:10;
FCC's (1)	filled (2)	8;108:24;109:3;	91:18,18	145:7,12;188:18
115:22	64:23;111:3	113:17;116:2,18;	following (7)	FRANK (1)
February (1)	final (3)	117:12,13;118:7;	29:6;38:15,16;	7:15
110:21	38:9;87:10;101:24	123:2;126:7;128:4,	44:25;115:17;118:6,	frankly (3)
fee (3)	Finally (1)	19;148:16;153:3;	7	46:15;128:16;
175:1,4;188:16	52:9	179:1;181:21;187:7;	follows (2)	194:10
feel (1)	Finance (2)	192:2;197:11;201:6,	60:4;168:5	Fraser (1)
20:2	5:13;158:4	16	follow-up (2)	15:11
fees (1)	financers (1)	FirstNet (1)	45:25;140:2	FRAWLEY (14)
103:10	132:8	122:19	foolproof (2)	7:23;19:6;73:12;
FELD (1)	financial (16)	fishing (4)	63:10,14	97:10;160:12,20;
5:2	31:25;37:4,7;57:6;	50:6,6;52:20;55:15	footing (1)	189:14,15,16,17,20;
fell (3)	60:24;69:4,91:2;	fit (4)	119:10	195:2,3;199:23
68:2,3,4	100:18;126:20;	39:13;67:18;	force (2)	free (2)
fellow (1)	129:5;135:6;163:21,	160:14;195:5	30:17;36:19	108:15;205:6
66:3	21;177:1;192:16,23	fits (2)	forces (1)	FREIMUTH (12)
few (14)	financially (1)	67:4;160:23	36:13	6:17;139:7,9,17,17,
50:13;53:21;60:12;	68:7	five (10)	foregone (1)	20;142:21;143:11;
61:25;62:1,10,14;	financing (14)	33:9;37:13;54:25;	138:10	146:11,20,23;149:24
84:19;100:3;113:25;	67:10;72:21;103:4,	75:20;76:5;123:2;	foreign (1)	frequency (3)
114:7;127:18;	8,14;128:21;131:14;	124:16;152:22;	194:4	112:24;119:3;
145:14;165:19	134:1;140:6;145:7,	156:19;157:12	forget (2)	134:18
fiction (1)	18;159:6;193:11;	five-minute (2)	128:11,16	Friday (1)
46:6	201:8	156:2,4	form (1)	13:25
fiduciaries (1)	find (17)	fix (1)	141:21	FRIEDMAN (42)
57:12	14:11,16;24:17;	59:23	formality (1)	6:2,7;19:20;31:7,8,
fiduciary (4)	47:17;50:19;52:23;	fixed (1)	27:15	8;32:21,25;33:6;
58:2;59:3,10;97:9	56:3;57:19;58:16,17;	18:8	formed (3)	41:20,22,25;42:3,6,9,
field (4)	63:11;89:19;98:10;	flashing (1)	99:14;116:24;	16,20,22;43:5,8,10,
163:13;164:14;	105:11;128:24;	32:22	196:12	12;44:2,5,20;51:15;
190:13,18	129:2;200:24	flaw (1)	forms (1)	53:13;63:7;135:18,
fifteen (3)	finding (3)	80:12	22:16	19;136:3,4,5,21;
18:7;123:7;194:7	23:24;191:21;	flawed (2)	formulate (1)	156:3;180:14,16,17,
fifteen- (1)	196:3	79:14;90:14	131:16	23;184:10,19,24
18:12	fine (12)	FLEISSIG (2)	forth (1)	friend (2)
fifty (4)	44:19;100:1;134:7;	9:2,9	187:22	51:18;58:21
76:14;91:15;132:2;	138:25;139:16;	FLOM (1)	Fortress (6)	friend/advisor (1)
137:14	156:17;167:5;176:2;	4:1	7:3,11;15:11;	98:4
fighting (1)	195:2;202:8,8,12	Floor (1)	155:8;176:15,16	friends (1)
71:9	finish (2)	8:14	forty (6)	21:14
figure (10)	100:2;196:15	flow (1)	115:22;123:5,8,20;	front (7)
14:8;17:2;58:9;	finished (1)	146:14	125:2;149:16	72:3;82:14,15,19;
83:2;99:17;167:1,17,	fire (1)	flowing (1)	forty-eight (1)	83:3;115:13;126:4
20;184:7;202:15		123:14	11:8	fronting (1)

62:25 frustrate (1) 30:5 frustration (1) 134:19 fulcrum (1) 40:12 fulfilled (1) 25:5 full (5) 54:19;66:4,5; 113:5;204:10 fully (2) 31:3;36:1 functioned (1) 98:2 functions (3) 45:16;94:8;110:2 fund (5) 36:16,21;47:2; 181:20;193:18 fundamental (4) 81:9;84:9;160:13; 195:21 fundamentals (2) 53:23;59:15 funded (1) 70:4 funding (2) 51:6;122:18 fundraising (2) 134:9;135:5 funds (10) 35:17;36:20;47:7; 91:3,4,4;99:2,3,3; 192:17 fund-type (1) 102:20 further (8) 58:6;103:18;118:9; 149:24;154:19; 155:9,16;189:11 furtherance (1) 100:17 Furthermore (1) 26:5 future (3) 16:2,9;44:13	Gary (1) 90:22 gave (6) 45:23;104:23; 121:12;125:1;155:1; 186:12 general (12) 47:16;58:22;96:22; 104:18,21;140:25; 158:3;163:18,23; 193:25;194:10; 197:19 generally (11) 111:9;115:3,7,8; 118:2;159:19;162:3; 8;163:5;164:11; 196:11 gentleman (1) 33:2 get-go (1) 66:1 gets (3) 57:20;172:1;191:7 gist (1) 48:17 GIUFFRA (75) 7:25;15:4,17,17,21, 24;16:12,20;48:22; 73:7,8,10,10,16; 74:21,25;75:8,15,18; 78:12;82:21;83:7,10; 89:8,19,25;90:3; 92:25;94:5;95:7,11, 14,19,23;96:1,6,10, 13,15,18;97:6,11,14; 98:13;100:4;101:6, 11;102:1;104:17; 105:1;106:12; 127:11;132:10,24; 133:11,12,13,16; 134:3;135:11,12,25; 136:13,17;150:1,4,5, 14;153:11,12,25; 154:2,4,19;181:11 given (8) 17:16;38:5;48:20; 61:16;78:3;86:3; 93:2;186:11 gives (1) 88:17 giving (3) 69:20;73:16; 103:24 GLENN (2) 4:17;18:25 global (3) 27:25;157:14; 166:1 Globalstar (2) 159:9;194:6 GLUECKSTEIN (2) 7:24;73:12 Gmail (1)	56:22 goal (1) 13:5 goes (9) 39:25;62:25;81:22; 187:7,15;188:12,19; 189:4;203:8 go-forward (1) 14:22 Golden (2) 166:3,4 Goldstein (4) 62:24;182:24; 183:2,6 gonna (1) 156:3 Good (49) 10:2,3,16,17;13:16, 17;15:3;17:5,7,10,11, 18,20;19:9,16;24:12; 46:12;50:18;53:15; 55:6;59:5;60:8;61:9; 64:8;65:1;67:17; 70:1,12;73:8,9; 102:14,19;108:22; 130:15;139:21,22; 157:3;165:17,18,18, 22;167:9;169:14; 189:21,22;199:15; 200:2;203:24;205:3 Goodbarn (5) 45:14,17,18;48:8,9 governance (3) 20:20;97:8;149:10 governed (1) 57:11 Government (2) 34:3;122:19 GPS (2) 125:13;196:17 graduation (1) 111:21 grand (2) 55:6;68:16 grant (1) 79:21 granted (1) 107:25 Great (9) 18:18;24:4;55:18; 61:15;110:17;136:7; 138:4;146:20;169:14 greater (2) 103:22;164:10 Green (1) 8:4 grew (1) 60:21 ground (4) 42:11;49:6;110:14, 15 Group (24) 4:2,10;9:12;11:9;	13:19;14:11;16:14; 19:1;40:19,25;41:3; 50:22;71:22;103:3; 104:19;131:2; 147:24;148:12,24; 157:17,19,19;158:9,9 grow (1) 131:1 GTE (6) 111:22,24,24; 112:1,5,6 guarantee (2) 174:12;194:15 guard (6) 122:9,13,25; 123:10,12;124:17 guess (4) 44:20;72:4;180:6,9 guessing (1) 59:16 guidelines (3) 27:12;44:24;60:17 gum (1) 48:13 GUMP (2) 5:2;204:3 guy (9) 33:12;48:2;49:3,4; 51:10,21;102:11; 165:7;191:5 guys (5) 49:21;51:20;52:4, 6;134:12	handful (1) 150:6 handling (1) 202:14 handouts (1) 73:13 hands (2) 20:24;130:24 HANSEN (1) 7:7 happen (5) 65:25;74:15;96:3; 120:4;180:24 happened (10) 39:23;45:3;83:21; 106:22,24;149:19; 174:12;180:23,24; 199:13 happening (5) 115:4,18;125:25; 130:21;131:11 happens (6) 53:24;86:21;101:2, 4;161:3;184:21 happy (3) 70:22;130:13; 199:20 HARBINGER (31) 2:4;6:3;31:9;48:11, 15;51:4;52:22;53:19; 54:20;55:18;56:16, 17;57:1,3;74:4;76:6; 80:1,5;81:22;82:14; 103:18;104:4; 105:13;107:4;114:9; 148:12;149:6; 151:15,20;152:15,22 Harbinger/Mr (1) 190:2 Harbingercom (1) 56:22 Harbinger-related (1) 176:14 Harbinger's (3) 56:19;77:20;152:4 Harbor (2) 22:13,15 hard (4) 54:4;130:20; 164:11;204:4 harder (2) 163:12,12 harm (7) 28:13;30:2;31:1; 56:10;102:21,22; 104:9 harmed (2) 21:8;62:22 harping (1) 107:8 hat (1) 98:4 hatched (2)
G			H	
gain (3) 20:9;21:1;28:1 GALLAGHER (2) 6:12;53:18 game (1) 42:4 gamut (1) 159:19 Garden (2) 5:22,23 Gartenberg (1) 202:13			Hadley (2) 17:12,21 hair (1) 70:22 half (6) 23:12;73:23; 103:14;157:12; 175:23;204:15 halfway (1) 183:1 hall (1) 155:25 halt (1) 54:1 halted (1) 155:9 ham (1) 167:25 HAMROFF (1) 5:20 hand (12) 12:1,2;46:7,7; 68:15;97:25,25; 98:11,12;109:9; 157:4;171:16 handed (1) 154:12	

55:6;68:17 hate (1) 69:7 hats (1) 57:7 HAUER (1) 5:2 H-band (2) 123:14,14 head (1) 53:21 heading (1) 151:19 headquarters (1) 22:17 healthcare (1) 159:21 hear (39) 21:17;22:3;23:17; 28:20,23,25;29:2,18; 30:24;44:22;53:11; 58:5,8,13;60:3,5,10, 19;61:12,18;62:8; 63:13,17,18,25;65:2, 4;67:5,17;69:1;75:6, 6;98:22;103:1; 108:13;132:8; 134:14;135:16;161:1 heard (25) 15:4;30:14;43:16; 76:1;93:22;94:12; 128:6,19,22;129:16; 134:16;135:14,15,17; 136:9,12,18,25; 137:1,11,17;153:3; 192:4,5;200:21 Hearing (10) 2:2;11:2,6;13:6; 16:8;129:17,17; 136:10;202:14,25 Hearsay (7) 132:10,24;135:13, 21,22;136:1,21 heart (1) 44:15 heavy (1) 73:1 hedge (4) 102:20;181:20; 192:17;193:18 heels (1) 11:6 held (5) 71:10,23;84:11; 88:15;128:8 help (8) 27:19;54:23;61:2, 9;97:7;137:25; 145:11,22 helped (1) 60:25 helpful (2) 55:13;71:8	helps (1) 61:5 hence (1) 45:1 hereby (2) 127:14;143:17 here's (1) 42:23 herring (1) 106:25 herself (1) 40:15 hey (1) 86:6 Hi (1) 150:5 hide (1) 22:24 high (1) 122:19 higher (5) 53:5;164:23; 173:18,24;174:7 highly (1) 103:6 high-power (1) 122:10 himself (1) 24:10 hire (2) 163:1,2 hired (2) 92:14;164:1 hiring (1) 152:23 Hirschfeld (18) 108:25;109:13,15; 124:21;127:8; 132:25;133:1,5; 134:5;137:2,5,8; 138:14;140:4; 143:14;154:22,24; 155:16 history (11) 50:10;83:16;84:5; 85:17,20;107:19; 111:21;118:2,3; 150:12;157:24 hit (3) 76:20;96:7;105:16 Hoc (30) 4:2,10;11:9;13:19; 14:11;16:14;19:1; 40:19,25;41:3;46:23; 50:21;70:20;72:19; 103:2;104:19;131:2; 147:24;148:12,24; 172:18,25;173:4,8, 14;186:21;187:20, 23;188:1,3 HOCK (1) 5:20 hold (12)	15:7;32:21;33:4; 42:2,4;54:10;57:1; 69:6;83:13;116:11; 192:24;200:12 holder (2) 87:5;181:20 Holders (3) 4:2;51:4;66:4 Holding (1) 23:24 Holdings (7) 22:20;54:9;70:24; 71:2;72:7;179:18; 180:2 holds (1) 177:21 holistic (2) 28:1;43:7 Holtz (1) 186:18 home (2) 37:2;60:15 honest (1) 45:16 honestly (1) 64:16 honey (1) 35:7 Honor (228) 10:16;11:1,7,11,14, 17,20;12:4,9,14,21; 13:10,16;15:4,17; 16:4,8,12,20,22; 17:11,13,20,23;18:5, 22,23;19:6,8,17;20:4, 5,11;21:9,13,16;23:4, 8,16,22;24:19;25:17; 26:11,14,16,20,23; 27:8;28:3,10,11,15, 17,22;30:2,15,17,19, 23;31:5,8,10,15,22; 32:14;33:14,21;34:7; 35:3,15;36:3,11,13, 22;37:25;39:1;40:4, 14,14;41:18;43:16; 46:5,14,20;47:6,9,10, 12,23;48:6;52:15; 53:1,7,9,12;58:14; 59:15;69:7;71:1; 73:8,14,17,20,25; 74:2,5,21,25;75:15; 76:20;77:13;78:12; 80:11;81:7,19;82:21; 83:7,21;85:16;86:4; 88:9,13;89:8,19; 90:17;91:8,10;92:25; 93:24,25;94:5;95:15; 96:6,10,11,18;97:14; 98:13;99:22;100:4; 102:9;103:1;104:5, 12,17;105:1,1; 106:12,24;107:1,7, 17,18,24,25;108:16,	22,24;109:13; 124:19;127:9,11; 132:10,24;133:1,5, 11;134:3;135:12,19, 25;136:13;137:3; 138:14,17;139:7,17; 142:23;146:21; 149:25;150:1; 153:11;154:2,22; 155:19;156:5;157:1; 160:10,12;165:11,13; 168:11;180:14; 181:11;184:10,19; 188:6;189:8,11,14; 191:25;192:21; 193:18;194:1,11,19; 195:2;199:25;200:3, 8,10,19;201:3,7,15, 25;202:2,15,19,21, 24;203:4,16,23; 204:1,20;205:4,8 Honor's (1) 87:13 Hootnick (12) 19:11;52:20;56:3; 70:22;72:14,15; 129:6;155:5,14; 186:18;187:2;188:25 hope (1) 55:23 hopefully (1) 28:19 hopes (1) 23:24 hoping (2) 52:19;102:7 hot (2) 191:5,8 hour (4) 99:25;100:1; 108:14;204:14 hour-long (1) 18:11 hours (2) 11:8;14:18 house (2) 191:4,5 housekeeping (3) 17:9;138:17; 146:13 Howard (1) 90:22 Howard's (1) 92:6 humor (1) 168:8 hunch (1) 53:4 hunches (1) 52:15 hundred (8) 27:13;33:22;36:5; 76:19;108:10;	124:23;163:19; 194:23 hundreds (3) 105:7;171:14; 177:12 hung (4) 28:4,14,15;30:7 Huntington (1) 8:6 husbands (1) 35:4 hypothetical (1) 83:9 hypothetically (3) 82:5,9;89:5
I				
Iacob (1) 15:12 Icahn (11) 51:6;62:25;96:4,9; 128:8,18,19;196:22, 24;197:1,2 ICO (2) 117:21,22 idea (8) 29:10;43:21;55:2; 153:1;167:9;170:3; 176:3;198:19 ideas (2) 142:10;155:8 identified (4) 40:22,24;186:2; 197:14 identify (4) 30:7;185:23;197:9; 198:4 identities (3) 56:12,15;58:9 identity (5) 22:17;56:16,17; 128:25;129:8 idly (1) 27:6 ignore (3) 80:7,8;175:17 ignored (2) 68:23;80:1 ill (2) 24:2;29:13 illegal (1) 62:4 illusion (1) 48:24 immaterial (1) 63:20 immediately (2) 121:20;122:4 impact (12) 104:3;105:13; 123:2;170:9,11,16; 177:6,10,17;180:12,				

13;199:18	indemnify (1)	in-house (2)	66:12;68:13;74:13	15:25
impacts (2)	77:1	26:25;47:23	Interestingly (1)	invalidate (1)
180:5,7	indemnity (3)	initial (3)	56:3	71:5
impermissible (1)	79:2;94:24;99:5	110:1;182:17,19	interests (3)	Invalidating (1)
62:3	independent (8)	initially (4)	40:7;122:21;	72:25
implication (1)	46:2,3;69:4;90:23;	111:22;112:23;	130:17	invest (2)
180:23	92:8,22;114:7;196:8	116:4;192:21	interfere (3)	168:21;169:2
implying (1)	indicate (2)	initials (1)	61:21;63:19;	invested (5)
180:24	32:15;111:13	167:11	103:17	29:21;34:25;58:12;
importance (1)	indicated (3)	initiate (1)	interference (21)	59:12;79:5
11:16	80:16;147:7;197:5	64:6	16:6;73:21,24;	investing (6)
important (17)	indications (2)	initiated (1)	74:18;75:18;81:9;	20:17;54:11;61:18,
11:14;12:24;13:22;	68:5;78:2	121:4	84:21,23;88:23;90:6;	24:62;2:70:11
23:15;64:20,20;	indirect (3)	Innkeepers (1)	100:9,15,22,25;	investment (52)
67:19;72:9;76:18;	81:14;85:23,25	194:1	101:13;104:13;	25:21;26:13;27:12;
85:17;90:18;98:21;	indirectly (1)	innuendo (5)	108:2;122:12,23;	33:22;34:1,5;35:1,4,
118:18,21;122:2;	82:11	59:25;60:2;74:13;	123:13;196:18	5;36:8;37:10;38:2,3;
127:23;147:14	induce (3)	77:20;87:12	internal (2)	44:24;46:11,18;47:5,
importantly (4)	161:24;174:3;	inquire (2)	39:6;50:1	12;59:21;60:7;62:12;
12:19;29:22,23;	191:17	33:17;88:24	international (1)	64:7,8;70:11,12,12;
62:5	induced (1)	inquiries (1)	113:13	72:25;75:7;76:10,12;
impose (2)	100:15	58:6	interpret (1)	77:2;78:20;91:9,12;
18:8;123:1	indulge (1)	inquiring (1)	83:6	92:12;94:20;95:15;
impossible (2)	35:11	21:3	interpretation (6)	99:14;102:19;
30:7,9	industries (1)	inquiry (4)	65:5;79:15;81:7;	117:13,15;134:24;
improper (1)	159:17	105:18;118:10;	82:1;87:13;107:9	137:24;141:12,14,19;
30:4	industry (7)	119:2;129:8	interpreting (1)	142:3;151:23;158:3,
imputation (2)	24:6;114:13,16;	inside (4)	87:25	16;168:18;191:2
100:10,22	115:4,6;159:20;	27:9;164:8,25;	interprets (1)	investments (17)
impute (2)	194:2	193:22	107:18	23:17,22;25:20;
81:23;90:15	ineligible (1)	instance (2)	interrupt (2)	28:18;33:19,20;
imputed (2)	84:25	43:12;58:10	69:7;195:1	36:23;57:8,9;61:25;
99:11;100:14	inequitable (4)	instead (2)	interrupted (1)	62:2;76:11;117:9,11;
inappropriate (2)	11:18,20,24;13:7	51:6;107:4	118:24	169:22;170:3;195:18
69:14,16	infelicitously (1)	instructed (1)	intervention (1)	investor (13)
Inc (2)	137:5	106:22	19:21	55:1,3;63:22;
5:21;8:3	infer (1)	instructs (1)	interviewed (1)	163:21;178:1,17;
incentives (1)	57:2	32:18	60:19	191:12,16,17;192:16;
83:23	inference (9)	insulate (1)	interviews (1)	194:9;198:22;199:18
inclination (1)	59:25;60:2;73:4;	22:23	132:7	investors (18)
36:19	77:24,25;78:5,9,12;	Insurance (1)	into (40)	38:5;54:13;61:25;
include (8)	101:19	8:12	21:3;40:12;41:10;	62:13;72:9;137:22;
13:7;80:24;81:18;	inferences (9)	intended (6)	60:12;69:12,12;72:2;	155:6,11;169:9;
85:2,22;86:7;87:2;	23:15;61:16;66:24;	26:15;82:7;84:14;	82:24;87:25;94:10;	173:12,14;174:6;
172:4	68:24;74:7,12,20,23;	87:4;88:12;137:2	10;106:7;111:23;	178:4,15,21;180:8;
included (2)	75:13	intent (1)	114:3;116:18;	191:13;198:14
104:18;127:21	inferring (1)	64:17	121:18;123:14;	invoked (2)
including (7)	59:17	intentional (2)	127:9,14;133:14;	17:13;22:6
11:9;20:1;26:24;	inflicting (1)	75:23;90:13	139:1;143:11,17;	invokes (1)
66:4;90:22;92:20;	56:10	intentionally (3)	146:12;151:19;	44:8
187:2	influence (12)	28:3,4;90:10	160:15;162:23;	invoking (1)
inconsistent (1)	26:3;29:17;40:9;	interest (14)	163:1,4;164:12;	19:2
92:11	162:11,15,21;163:16;	24:4;66:4;72:12;	166:11;168:7;	involve (2)
increase (1)	164:9,10,21;194:15,	85:11;98:1,5;100:18;	172:12;173:17;	112:15;159:18
33:8	16	116:17,19;144:1,6;	174:18;184:23,24;	involved (31)
incredible (1)	information (7)	190:14;191:18;	198:23;204:7;205:6	20:21;30:13;59:11;
35:15	48:20;55:2,19;	198:22	intricacies (1)	80:25;81:1;102:13;
incredibly (1)	56:3;66:16;92:21;	interested (9)	193:20	107:20;114:16;
12:23	192:22	31:23;33:8;72:15;	intrinsically (1)	127:22;130:4;
incumbent (1)	informed (2)	98:7;125:21;134:23;	192:9	131:20,22,23;137:22;
164:24	17:16;78:10	136:10;144:7;160:3	introduce (2)	138:9;152:23;
indeed (3)	inherently (1)	interesting (6)	108:25;135:13	159:12,15,24;165:22;
38:8;39:23;63:17	194:24	20:11;39:12;42:16;	introducing (1)	166:11,16;169:8,15,

22,25;173:4;175:12; 186:14,18,20 involvement (4) 108:9;131:18; 137:20;188:17 involves (2) 60:16;161:9 involving (5) 83:11;84:2;88:14; 169:22;187:1 ironclad (1) 82:23 irons (1) 67:15 irrelevant (1) 54:22 irrespective (1) 28:10 isolate (1) 122:14 issue (15) 19:4;31:11,11; 53:8;82:1;106:14,24; 123:18;156:7;163:8; 166:20;177:19,21; 193:12;203:22 issued (2) 118:8;121:10 issuer (1) 36:9 issues (26) 37:3;43:17,18; 69:13;90:24;97:19; 122:5;124:1;125:13; 138:21;161:10; 162:24,24,25;177:23; 178:14,18;179:4,7; 190:1,3,24;196:18; 203:17;204:6,7 items (2) 123:24;196:15	49:18;51:20,23 job (7) 27:7;55:24;60:20; 73:4;115:9;161:24; 174:2 JOHN (1) 9:12 join (4) 46:23;72:4,7; 114:11 joined (12) 40:25;72:10,11,11, 13;109:25;111:22, 23;112:6,9;158:8,10 joining (1) 72:17 joins (1) 40:19 joint (1) 40:11 joke (1) 184:13 Joshua (2) 108:7;203:16 Journal (5) 179:20;197:13,17, 18,22 JP (2) 201:9,10 JPM (1) 201:20 JPMorgan (1) 4:21 JR (1) 9:8 judges (1) 21:10 judge's (1) 18:7 judgment (5) 79:20,21,22; 107:25,25 JULIA (1) 4:15 July (19) 41:1;66:21;111:7; 118:11,25;119:1; 142:18;143:1,16; 158:10;174:15,15; 175:9;187:5,13,19, 25;188:18;189:3 jump (1) 139:3 jumping (3) 15:1,1;138:24 June (5) 40:19;71:1;130:4; 132:16;179:21 junior (1) 54:19 justifiable (1) 62:4 justification (1)	75:24 justify (1) 63:23 K Kaiser (26) 21:5,20,24;22:3,9, 15,19;24:17,21;25:2, 5;26:8,21;32:2,4,12, 19;33:7;37:9,18,18, 23,24;38:11,14,18 KAREL (1) 8:17 KARPE (2) 8:11,17 KASOWITZ (2) 6:2;151:11 keep (17) 18:13,15,17;59:4; 61:20;96:17;115:3; 146:14,15,19;151:20; 152:7,8;154:1; 169:12;201:22; 203:12 keeping (3) 62:9;72:5;204:24 keeps (1) 119:4 kept (1) 67:11 Ketchum (14) 22:19;26:6,6; 37:10;38:1,3,10,12, 14,15,18;49:21,22,23 Ketchum/Ergen (1) 39:7 key (1) 37:25 kind (15) 14:14;77:5;116:23; 131:5;134:12,14; 162:15;191:3,4,5; 192:15;193:1; 194:25;204:23,24 kinds (4) 45:4;57:5;106:16; 187:22 Kirkland (2) 108:8;203:17 Kirschner (1) 45:5 Kiser (24) 57:24;58:22,23,24, 24;60:19;70:2;82:9; 90:15;91:1,1;93:15; 94:7;97:4;98:1,14, 22;100:7,13;156:14, 14,16;200:5,20 Kiser's (1) 94:21 knew (15) 49:11;50:11;53:3;	63:6,6,8;71:21; 77:16;78:6,7;88:4; 96:24;101:18; 182:14;193:18 Knighthood (1) 181:19 knowing (1) 60:8 knowledge (4) 61:23;75:22;121:7; 188:18 known (18) 24:6;61:7;81:18; 85:2,3;87:2,3,6,8; 88:3;89:9;117:21; 128:1;132:16,18; 179:25;193:23;198:8 knows (12) 39:1;59:16;60:5; 61:1;73:20;76:22; 81:19;82:1;164:12; 180:18,19,25 KRISTOPHER (1) 7:7 KURTZ (5) 4:17;18:23,24,25, 25 KYE (1) 8:2 L L2 (1) 40:7 L2's (1) 40:9 labels (2) 74:13;83:4 lack (3) 108:9;133:25; 188:23 laid (1) 173:21 land (1) 59:25 landscape (1) 195:14 Lane (1) 7:4 language (21) 79:17;80:1;81:4, 13,23;82:3;83:10; 84:6,16,24;85:1,21; 86:14,23,25;87:1,17; 89:8;107:7,22; 155:11 large (6) 60:7;63:21;71:22; 76:11;131:12;191:15 largely (2) 40:15;69:12 larger (1) 184:7	largest (5) 25:12;29:20;33:25; 34:1,5 last (28) 11:8;16:8;41:18; 43:16;44:20,21,22; 48:5,6;49:7;52:4; 57:4;73:22,25;80:14, 22;100:23;104:12; 113:15;148:15; 150:21;152:1;155:4; 174:10;179:16; 185:15,16,19 late (6) 72:2;100:3;120:19; 158:1;175:24;197:24 later (7) 40:20;121:8; 129:13;168:1; 184:16;192:25; 203:12 Latham (4) 83:14,22;86:5,21 LAURIA (19) 4:14;11:3;13:11, 16,18,18;14:2,15,20, 23,25;16:22,25;17:2, 6;70:21;187:1,11,12 Lauria's (1) 187:17 LAVAN (2) 7:2,10 LAW (24) 8:11;45:4;55:15; 62:3;69:4;70:18; 74:6;79:14;82:18; 84:2,10;85:7,88:15; 93:9,10,18;94:4; 98:19;99:12;107:9, 10;162:1;163:2; 164:1 laws (1) 57:11 lawsuit (5) 17:23;20:5;48:15, 25;59:6 lawsuits (2) 59:7;107:4 lawyer (6) 37:3;47:23;55:22; 56:2;58:24;163:1 lawyers (14) 31:24;55:18,24; 61:2,4;80:9;82:22; 83:14,20;84:6; 107:19;151:11,13,14 lay (3) 10:21;173:13,16 layer (2) 164:16;193:22 layers (2) 105:17;135:17 LBAC (37)
J January (3) 12:6;51:20;130:3 Jason (9) 21:20;37:9;60:19, 20,23,23,24;61:5,12 Jay (1) 33:7 JED (1) 6:9 Jefferies (14) 51:9;103:4;131:14, 18,20,22,24;132:5; 133:6;135:3,5; 137:14;158:8,11 Jefferies' (1) 132:2 JEFFREY (1) 5:17 Jeffries (3)				

11:3;14:4;15:21; 16:1;16:27;20:23; 40:20,21,22,25;41:4; 10;47:7;66:20;92:16; 104:19;105:2,16,21, 24,25;107:5;135:9; 137:12;173:5,8,19, 25;175:9,16;176:17; 187:14;189:1,4; 192:7;197:24	lenders' (1) 172:25	67:3,15,17;68:7,12, 13;70:3,11,19;71:10; 72:19,20,21;74:11, 17;75:19;77:17;79:6, 25;80:4,8,15,20,24; 82:22;85:18,23; 87:19;88:6;92:3,13; 100:8;101:17,18; 102:23;103:4; 105:12;106:17; 107:2,5,11;109:18, 20,22,25;110:3,20; 111:1,2,6,8,10;114:9, 11;115:14;117:20; 118:6;119:7;120:11, 15,18;125:12,17,21; 126:18;127:16; 130:5,6;131:8,15,15; 132:5;133:7;134:19, 24;135:6,8,21; 137:25;140:5,10,21; 141:12,15;142:7,12, 16;143:1,16;144:13; 145:6,10,17;146:2; 147:23;148:12; 150:9,19;151:16; 152:4;153:14,17,24; 154:7,17;168:18,21; 169:2,6,18;170:21; 176:9;177:1,14,17, 20;178:9;179:19; 180:2;181:22,25; 182:11;186:15; 189:25;190:25; 195:17;196:7,16; 197:3,10;198:15,21; 200:18;201:13,14	113:13;184:23,25, 25	longest (1) 63:20
LBAC's (5) 29:15;30:12;59:9; 192:1,3	lends (1) 192:18	LightSquared's (16) 20:17;27:3;30:6; 31:4;72:9;73:22; 94:13;117:16;125:8; 128:2;132:19; 144:18,24;147:13,15; 149:10	lines (2) 66:10;154:10	look (24) 32:25;47:11;72:22; 79:17;83:11;84:10; 94:21;105:5;106:7; 108:13;125:16,25; 126:3;142:22; 145:21;154:25; 155:2;164:1,2;182:1; 185:6,8;186:24; 202:9
L-Band (1) 6:13	length (1) 87:15	likely (4) 38:6;61:24;164:2; 194:16	liquidate (1) 30:22	looked (5) 90:23;92:5;103:11; 141:22;172:17
lead (6) 11:21,24;12:2; 14:1;22:18;63:20	LESLIE (1) 5:25	likes (1) 26:12	liquidated (1) 36:5	looking (15) 21:19;32:22,24; 33:3;79:6;84:14; 98:20;103:21; 115:16;131:21; 163:21,22;182:25; 196:9;201:23
leading (2) 23:22;157:21	Less (4) 29:9;78:3;84:17; 162:12	liking (1) 54:16	liquidity (1) 59:20	looks (6) 82:10;95:15; 107:18;138:9,10; 182:17
learn (2) 49:23;129:14	letter (3) 43:14;93:9;201:8	limit (1) 136:24	list (14) 80:24;87:19,20; 126:24;127:1,6,17, 18,20,20;177:12; 186:3;196:15;200:23	loosely (1) 65:9
learned (6) 11:2;35:16;91:5; 99:13;127:25;129:19	letters (1) 70:23	limitation (1) 154:16	listed (5) 22:16;86:9,11,18; 126:9	Los (3) 7:13;158:1,2
least (13) 25:22;33:9;41:7; 71:20;85:6;130:24; 142:15;144:3;162:6; 175:14;178:16,22; 192:15	level (8) 33:9,10;46:23; 66:3;114:22;163:13; 164:14;190:17	limitations (2) 121:15,17	listen (1) 36:3	lost (1) 79:4
leave (4) 59:24;108:12,15; 205:6	levelness (1) 190:13	limited (3) 105:12;118:19; 134:2	literally (2) 11:11;102:5	lot (29) 39:16,17;44:2; 46:20,21;55:5;60:5,8, 13,16;61:17;66:23, 23,24;67:23,24; 68:24;70:10,19; 89:11;125:17; 130:21;163:3,3; 165:7;191:8;194:16; 195:13,21
Leblanc (1) 34:18	level-playing-field (1) 163:8	limits (4) 41:13,14;94:20,20	litigation (22) 45:23;48:7,10,24; 49:5;66:18;68:22; 70:19;78:19,24;79:9; 80:4;106:15,16; 151:2,4,5,8,9,12,14; 196:18	lots (9) 55:19;56:25;64:6; 73:2,2;74:9,9; 137:19;202:25
led (2) 113:22;156:14	lever (1) 46:23	line (4)	live (2) 158:23;159:2	loud (1) 72:13
Lee (1) 15:12	leveraging (2) 192:19,20		lives (1) 37:5	loudly (1) 160:19
Leek (1) 194:5	levered (1) 40:12		LLC (3) 2:5,21;6:3	low (3) 148:17;193:6,7
left (6) 39:2;58:17;112:6; 114:1,5;117:8	Lexington (1) 4:22		LLP (13) 4:1,9,20;5:2,11,20; 6:2,12;7:2,10,18;8:2; 9:2	low-ball (1) 192:3
legal (6) 56:1,12;57:6; 73:20;82:1;129:16	liable (2) 93:11;100:16		loads (2) 66:13,13	low-cost (9) 138:5;140:23; 141:4,7,8,11,24; 142:2,6
legitimate (1) 163:6	license (7) 115:23;118:12,22; 120:3,15;147:8; 177:22		loan (4) 38:6;39:7;79:16; 99:5	lower (3) 30:19;81:20; 107:23
lender (8) 50:21;71:20;72:8; 88:3,4,10,10;191:12	licenses (10) 117:8;118:8,9; 119:23;120:1,6,11, 16,25;178:2		loan-to-own (10) 30:24,25;38:2,4,8; 39:6,8,8,22,22	lowest (1) 61:23
Lenders (27) 4:10;11:10;12:1; 13:19;70:21;88:12; 130:14,15;131:2; 132:8;133:9;150:9; 172:18;173:4,8,15; 186:22;187:20,23; 188:1,3;191:13; 201:11,11,13,14; 202:9	lien (1) 181:21		lock (1) 205:5	
	life (2) 56:20;60:6		locked (1) 46:11	
	light (4) 13:3;16:15;68:25; 87:24		long (18) 10:10;18:15;39:14; 46:22;60:2;67:14,21; 74:3;80:22;109:22; 112:17;133:23; 138:1;153:11; 157:11;175:23; 181:21;187:1	
	LightSquared (189) 17:21;19:18;20:23; 21:19,23;22:14;24:3, 7,12;26:1,2,15;29:4, 8,11,16;30:2;31:1,16, 23;33:25;34:11;38:4, 10,19;39:11,12;40:1, 3,6;45:20;46:19,21; 51:4;52:8,22;53:19; 55:18;56:16,18,20, 23;57:1,3;59:21; 61:19,19,22;62:13, 23;63:6;64:1,4,6;			

low-power (1) 122:11	118:10;119:2;121:5; 8;129:9;132:3;	MAST (4) 11:10;155:8; 202:23;204:3	140:24;158:25; 163:20;171:6,14; 175:14;182:2,21; 202:2;204:14	126:19,22
loyalty (2) 57:13;58:3	134:23;141:12; 164:13;168:24; 169:6;180:18	master (2) 55:6;68:16	McCloy (2) 17:12,21	mental (3) 135:22,23;160:16
LP (11) 4:2;11:9;13:19; 23:12,13,23;26:10; 105:12;155:10; 187:13;193:14	man (1) 52:13	masters (1) 111:17	MCCUTCHEN (1) 5:11	mentioned (10) 10:5;25:13;27:18; 59:15;91:9;130:13; 178:16,23;191:1; 196:1
LTE (2) 113:19,20	manage (3) 38:17,19;79:7	match (2) 67:18,22	MEAGHER (1) 4:1	mere (3) 27:15;94:7;190:5
Lucy (2) 126:6;127:13	managed (3) 25:18;35:25;36:6	math (5) 114:2;179:21; 193:17;194:19,20	mean (29) 12:16,17,19;14:9; 34:12;40:15;44:7,17; 48:14,19;52:21;53:2; 83:2,6;86:18;89:16; 97:17;102:14; 151:22;152:5; 158:23;162:10; 172:3;175:22; 179:24;190:22; 194:4,5;199:4	merged (1) 113:23
lumps (1) 54:5	Management (11) 22:10;25:19;35:17; 45:8;67:8;95:17; 111:17;132:3;135:6; 158:16,17	Matt (2) 52:12;200:17	means (13) 36:19;52:1;54:2; 59:24;60:12;85:4; 94:14;162:3,6;163:1; 170:13;171:7;200:6	merited (1) 43:19
lunch (4) 18:11;70:23;72:15; 99:20	management-training (1) 111:23	matter (18) 33:18;55:16;56:12; 62:6;63:7;65:19; 69:17;78:22;81:23; 82:18;94:4;97:11; 99:12;126:22; 146:13;161:14; 201:6,7	meaning (6) 25:4;34:3;84:13; 116:4;138:1;161:16	MEROLA (1) 7:15
lunchtime (1) 204:13	managerial (1) 157:18	matters (14) 17:9;53:2,3;57:5; 60:24;69:12;91:2,21; 159:3,5,6;161:7; 196:1;201:5	meant (3) 48:19;153:10; 192:25	Merrimack (1) 111:16
lying (3) 51:11,18;161:25	managers (2) 61:1,4	MATTHEW (6) 6:17;9:7;17:20; 62:24;139:17;182:24	measure (2) 44:12,13	message (2) 184:21,24
M	manages (1) 25:19	maximize (1) 196:9	mediators (1) 45:6	Messrs (1) 93:15
M&A (2) 159:7;160:11	Managing (2) 157:14,16	maximizing (2) 13:1;192:18	meeting (18) 18:7,9;126:19; 143:2,8,10,16; 145:17;146:1,2,5,6,8, 10;155:5;175:12; 187:16;203:21	met (14) 43:21;61:13;132:1; 139:25;140:21; 141:6,23;142:1,7; 145:14;150:6;155:7; 165:19;181:24
mad (1) 77:3	mandatory (1) 18:9	may (87) 14:9,11;19:11; 24:14;25:25;27:4; 35:11,12;38:16; 47:14;49:10,12,14; 50:10,10,12,12,20, 25;51:2,2;52:9,10,23, 24;55:2,2,4,10,14; 66:21;68:11,15,19, 20;69:2;70:17;77:3, 17;87:18,23;91:6; 92:4;96:9,20;106:14; 127:17;128:6; 129:13,14;130:1; 131:11;137:1; 138:20;148:8,20; 151:3;153:1,6,9,10, 13,16;154:6,15; 156:7;160:7;165:13; 166:19;179:21; 180:10;182:1,3,13, 23;184:6;185:3,25; 191:18;194:17,25; 196:16;197:24; 199:14,14;201:7; 202:21	meet (2) 43:15;54:17	MetroPCS (2) 67:5;68:3
Madison (1) 9:3	manifestation (1) 93:18	may (87) 14:9,11;19:11; 24:14;25:25;27:4; 35:11,12;38:16; 47:14;49:10,12,14; 50:10,10,12,12,20, 25;51:2,2;52:9,10,23, 24;55:2,2,4,10,14; 66:21;68:11,15,19, 20;69:2;70:17;77:3, 17;87:18,23;91:6; 92:4;96:9,20;106:14; 127:17;128:6; 129:13,14;130:1; 131:11;137:1; 138:20;148:8,20; 151:3;153:1,6,9,10, 13,16;154:6,15; 156:7;160:7;165:13; 166:19;179:21; 180:10;182:1,3,13, 23;184:6;185:3,25; 191:18;194:17,25; 196:16;197:24; 199:14,14;201:7; 202:21	meets (3) 48:19;153:10; 192:25	Michael (1) 108:25
magic (1) 202:10	many (15) 19:23;51:3;67:10; 128:15;134:16,16; 145:1;158:22;159:1, 11,14;163:22;164:9; 171:1,12	maximizing (2) 13:1;192:18	measure (2) 44:12,13	microphone (4) 110:17;133:14; 154:1;169:14
magnitude (1) 33:20	map (1) 173:16	maximizing (2) 13:1;192:18	mediators (1) 45:6	middle (2) 119:12;132:16
MAGNOZZI (1) 8:2	Marc (3) 110:24;126:20; 129:5	may (87) 14:9,11;19:11; 24:14;25:25;27:4; 35:11,12;38:16; 47:14;49:10,12,14; 50:10,10,12,12,20, 25;51:2,2;52:9,10,23, 24;55:2,2,4,10,14; 66:21;68:11,15,19, 20;69:2;70:17;77:3, 17;87:18,23;91:6; 92:4;96:9,20;106:14; 127:17;128:6; 129:13,14;130:1; 131:11;137:1; 138:20;148:8,20; 151:3;153:1,6,9,10, 13,16;154:6,15; 156:7;160:7;165:13; 166:19;179:21; 180:10;182:1,3,13, 23;184:6;185:3,25; 191:18;194:17,25; 196:16;197:24; 199:14,14;201:7; 202:21	meet (2) 43:15;54:17	mid-size (1) 191:14
Maiden (1) 7:4	March (1) 40:17	may (87) 14:9,11;19:11; 24:14;25:25;27:4; 35:11,12;38:16; 47:14;49:10,12,14; 50:10,10,12,12,20, 25;51:2,2;52:9,10,23, 24;55:2,2,4,10,14; 66:21;68:11,15,19, 20;69:2;70:17;77:3, 17;87:18,23;91:6; 92:4;96:9,20;106:14; 127:17;128:6; 129:13,14;130:1; 131:11;137:1; 138:20;148:8,20; 151:3;153:1,6,9,10, 13,16;154:6,15; 156:7;160:7;165:13; 166:19;179:21; 180:10;182:1,3,13, 23;184:6;185:3,25; 191:18;194:17,25; 196:16;197:24; 199:14,14;201:7; 202:21	meeting (18) 18:7,9;126:19; 143:2,8,10,16; 145:17;146:1,2,5,6,8, 10;155:5;175:12; 187:16;203:21	midst (1) 64:10
mails (1) 184:13	marital (1) 35:6	may (87) 14:9,11;19:11; 24:14;25:25;27:4; 35:11,12;38:16; 47:14;49:10,12,14; 50:10,10,12,12,20, 25;51:2,2;52:9,10,23, 24;55:2,2,4,10,14; 66:21;68:11,15,19, 20;69:2;70:17;77:3, 17;87:18,23;91:6; 92:4;96:9,20;106:14; 127:17;128:6; 129:13,14;130:1; 131:11;137:1; 138:20;148:8,20; 151:3;153:1,6,9,10, 13,16;154:6,15; 156:7;160:7;165:13; 166:19;179:21; 180:10;182:1,3,13, 23;184:6;185:3,25; 191:18;194:17,25; 196:16;197:24; 199:14,14;201:7; 202:21	meetings (10) 133:22;135:10; 136:8;137:9,14,15, 18;144:2;151:10; 186:21	might (30) 42:1;47:21,21; 48:3;49:5,13;52:16; 59:19;65:23;84:14; 102:7;105:18; 125:23;134:23; 144:7;153:21; 169:25;180:12; 183:19,22;189:24; 190:3;191:4,16,17; 195:20;196:18,22; 197:6;199:1
maintain (3) 72:10;141:2; 195:20	Mark (2) 129:6;189:2	may (87) 14:9,11;19:11; 24:14;25:25;27:4; 35:11,12;38:16; 47:14;49:10,12,14; 50:10,10,12,12,20, 25;51:2,2;52:9,10,23, 24;55:2,2,4,10,14; 66:21;68:11,15,19, 20;69:2;70:17;77:3, 17;87:18,23;91:6; 92:4;96:9,20;106:14; 127:17;128:6; 129:13,14;130:1; 131:11;137:1; 138:20;148:8,20; 151:3;153:1,6,9,10, 13,16;154:6,15; 156:7;160:7;165:13; 166:19;179:21; 180:10;182:1,3,13, 23;184:6;185:3,25; 191:18;194:17,25; 196:16;197:24; 199:14,14;201:7; 202:21	member (6) 25:12;29:22;90:22, 23;103:6;150:15	Milbank (9) 15:12;17:12,21; 81:1;83:15;86:12; 107:22;108:23; 200:17
maintaining (2) 151:25;152:3	marked (1) 153:5	may (87) 14:9,11;19:11; 24:14;25:25;27:4; 35:11,12;38:16; 47:14;49:10,12,14; 50:10,10,12,12,20, 25;51:2,2;52:9,10,23, 24;55:2,2,4,10,14; 66:21;68:11,15,19, 20;69:2;70:17;77:3, 17;87:18,23;91:6; 92:4;96:9,20;106:14; 127:17;128:6; 129:13,14;130:1; 131:11;137:1; 138:20;148:8,20; 151:3;153:1,6,9,10, 13,16;154:6,15; 156:7;160:7;165:13; 166:19;179:21; 180:10;182:1,3,13, 23;184:6;185:3,25; 191:18;194:17,25; 196:16;197:24; 199:14,14;201:7; 202:21	members (4) 10:5,7;26:24; 152:14	mile (1) 58:9
maintains (1) 39:15	Market (11) 61:23;62:7,21; 63:2;83:24;88:8; 103:7,11;135:20; 193:13,17	may (87) 14:9,11;19:11; 24:14;25:25;27:4; 35:11,12;38:16; 47:14;49:10,12,14; 50:10,10,12,12,20, 25;51:2,2;52:9,10,23, 24;55:2,2,4,10,14; 66:21;68:11,15,19, 20;69:2;70:17;77:3, 17;87:18,23;91:6; 92:4;96:9,20;106:14; 127:17;128:6; 129:13,14;130:1; 131:11;137:1; 138:20;148:8,20; 151:3;153:1,6,9,10, 13,16;154:6,15; 156:7;160:7;165:13; 166:19;179:21; 180:10;182:1,3,13, 23;184:6;185:3,25; 191:18;194:17,25; 196:16;197:24; 199:14,14;201:7; 202:21	memo (2)	milestone (2) 11:4;43:22
major (2) 131:7;140:11	marketing (1) 158:18	May (15) 41:7;72:23;102:19; 106:20;121:1;		milestones (4)
majority (10) 23:13;31:10;34:13; 85:6;152:14,16,18, 19,20;170:1	marketplace (3) 193:5;197:19; 198:24			
makes (10) 39:16,17,18;46:15, 16;85:20;89:1;99:22; 125:17;165:3	marketplace's (1) 193:4			
making (18) 33:22;50:2,3;55:8; 92:19;106:10;	markets (1) 159:6			

43:15;19,20,20 million (19) 27:13;29:3,19; 33:23;34:10;35:18; 36:5;42:13;76:13,14; 91:14,16;95:8,19,24; 142:4;149:7;165:5,7 million-dollar (2) 95:3;165:8 millions (1) 105:7 mind (16) 42:5;49:5;94:12, 13,16;97:21;98:6; 135:20,21,23,25; 136:11;141:18; 164:17;192:16;199:3 mindful (1) 54:13 minimis (1) 166:7 minimum (1) 163:2 minority (4) 169:22;170:1,3; 195:18 minute (5) 18:13;41:13;84:4; 126:14;174:11 minutes (19) 18:7;53:21;90:21; 92:4;100:3;143:1,7,9, 16,20,22;144:14,23; 145:2;146:1,8,10; 147:5;156:19 mirror (1) 72:23 missing (2) 182:15,17 mission (1) 30:25 misspoke (2) 96:6;153:9 mobile (1) 112:2 mode (1) 40:12 modification (1) 147:9 modifications (2) 119:25;120:11 modified (2) 118:9;121:6 Moelis (13) 129:6;135:6,15; 137:10;155:5; 157:10,11,13,24; 158:10;186:15; 188:15;198:13 Moelis' (1) 185:12 moment (11) 19:10,11;31:1;	41:21;61:14;69:6; 98:5;99:16;126:3; 139:3;181:14 Monday (5) 200:24;201:11,16, 24;202:6 monetize (1) 36:20 money (29) 25:16;29:3;34:8,8, 11,12,13,14,15;35:8, 18,21;36:15,16;39:2; 46:25;47:1,3;54:21; 58:12;70:10;77:7; 78:13;79:4;94:22; 99:8;107:15;132:2; 163:3 Montagner (4) 110:24;126:20; 129:5;146:25 Montagner's (2) 126:22;147:11 month (5) 43:21,23;73:25; 77:8;198:10 months (6) 40:21;66:19;69:3; 113:25;179:17,22 more (44) 12:11,19;14:12; 20:11;23:12;27:7,13, 13;35:15;41:18;44:8; 55:5;56:10;61:17; 63:21;68:8;70:22; 76:13;77:8;84:2,16; 91:14;95:8,24;97:23, 24;103:21;105:19; 114:24;117:9; 119:24;134:14; 136:17;140:25; 152:5;158:25,25; 159:16;160:19; 162:2;165:3;183:8, 12;204:15 Morgan (2) 201:9,10 MORITT (1) 5:20 morning (30) 10:2,3,16,17;13:16, 17;15:3,9;17:10,11, 20;20:2;53:15,16; 59:19;73:8,9;76:2; 79:25;81:18;93:23; 108:11;156:16; 187:13;200:5,6,21, 24;201:16;202:6 most (23) 11:8,13;12:18; 34:11,14;36:25;37:4; 38:4;41:16;48:2; 55:11;59:20;62:4; 63:19;64:12;69:18;	125:24;147:6; 161:18;162:5;164:2; 190:7;202:17 mostly (2) 125:13;192:15 motion (11) 55:14;74:3,4,4; 76:6;90:19;99:8; 192:22;201:8; 204:20,21 motions (1) 204:22 motivated (2) 24:1;130:17 motivation (2) 28:10;63:23 motivations (3) 42:25;59:17;72:12 Motors (1) 98:20 move (10) 12:24;15:8;41:24; 79:22;127:8;143:11; 146:11;189:8;201:9, 11 moved (3) 42:8;79:19;80:14 moves (2) 64:21;169:14 moving (3) 11:15;13:5;201:20 much (39) 12:11;16:20;53:5, 5;54:16;63:21;64:11; 67:1,4,11;76:1;93:9; 94:22,23;97:22; 99:24,24;103:23; 106:11;107:21; 108:5;114:25; 116:24;122:17; 128:9;136:17; 151:20,23;152:7,9; 168:7,8;170:11; 191:7,20,24;192:11; 196:8;200:2 multi-billion (1) 41:10 multiple (1) 57:6 multitude (1) 11:12 MUNDIYA (49) 6:19;19:7,8; 155:21,24;156:5,7,9, 12,18,21;165:12,13, 16;166:25;167:3,5,7, 9,13,16,20,22,24; 168:1,11,13;171:3,6, 8,10;180:20;181:1,2, 4,9;184:4,15;185:2; 188:8,14,15,22; 189:8,11,23;200:4,5; 204:14	Murgio (1) 56:25 must (4) 81:10;82:3;102:14; 191:3 myriad (1) 67:3 myself (1) 14:16 N NA (2) 4:21;5:3 nada (1) 87:9 NAGY (2) 9:2,8 name (3) 22:12;35:19;45:17 narrow (1) 84:2 narrower (2) 83:23;86:22 national (4) 113:4,6,6,13 natural (7) 70:5,7;86:8; 125:11;152:8;195:5, 17 nature (6) 17:8;18:3;26:21; 141:18;147:6;160:17 neat (1) 28:21 necessarily (3) 57:3;174:9;199:6 necessary (1) 21:1 need (28) 14:18;16:7;17:3; 18:6,6;28:22;42:24; 50:19;59:23;61:17; 70:20;78:6;105:5; 108:7;118:16;120:3; 121:12;122:8;123:9; 124:17;125:7;134:6; 139:12;147:7;163:1, 2;169:11;187:15 needed (5) 29:12;46:23;80:17; 120:17;186:20 needs (4) 10:14;63:22; 108:20;125:5 negative (3) 177:6,9,13 neglected (1) 15:6 negotiate (5) 30:6;86:2;106:18; 152:10;194:17 negotiated (2)	37:19;80:9 negotiating (4) 55:4;80:25;102:24; 130:23 negotiation (6) 80:21;84:1;106:20, 23;131:6;150:8 negotiations (5) 87:16;103:17; 140:5;148:11;187:14 neighboring (3) 121:19;122:7,24 neither (2) 32:13;168:10 net (1) 112:2 network (34) 24:1;29:13;110:1, 3,4,6,6,8,9,10,10,13, 13,14,19;112:7,8,12, 15;113:6,11,18,18, 20;116:5,9;117:19; 118:16,17,21;119:22; 122:19;125:4;185:25 networks (8) 113:1,2,10,14,17; 114:20,23;115:5 Nevada (10) 66:12;68:23;69:12, 18;93:4;97:15,16,20; 106:14,22 New (22) 2:23;4:4,12,23;5:5, 15;6:5,15;7:5,21; 8:15;9:4;22:22;54:3; 62:3;64:19;83:11; 84:9;88:15;93:18; 121:4,5 newest (1) 70:5 NEWMAN (1) 5:8 newspaper (1) 41:17 next (15) 28:19;35:3;37:13; 41:3;53:14;60:4; 86:21;89:13;99:17; 117:5;122:11;156:9, 13;200:20,23 Nextel (14) 112:6,7,9,10,14,17, 18,18,21,21;113:6, 10,12,15 nexus (2) 97:21,22 nice (2) 28:20;139:23 night (3) 13:24;73:22;80:23 nine (13) 40:14,20;56:12; 80:22;81:8,11;84:24;
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87:11,14;97:22; 107:8,17,22 nobody (3) 46:1,3;56:4 nobody'll (1) 80:3 nod (1) 27:8 NOL (1) 53:25 nonbankruptcy (1) 190:11 non-constituents (2) 12:12,17 non-DISH (1) 34:8 None (2) 56:6;104:5 nonetheless (1) 83:5 non-public (1) 55:1 non-SPSO (1) 12:1 nor (5) 32:13;44:21; 166:13;168:10;179:1 norm (2) 63:21,22 normal (1) 65:22 normally (2) 106:16;122:13 notable (1) 64:12 notch (1) 65:21 note (4) 12:15,21;62:14; 64:2 noted (5) 16:8;67:9;143:25; 144:6;155:7 nother (1) 164:16 notice (6) 11:3;13:23;54:10; 118:10;119:1,2 noticed (1) 201:5 notion (6) 31:20,21;41:12,19; 48:7;102:9 notwithstanding (2) 91:12;92:23 November (1) 175:20 number (19) 32:14;42:24;45:24; 47:15;54:25;96:7,9; 112:22;113:3; 123:24;126:7; 128:11;129:10;	143:20;145:10; 147:1;150:18; 158:15;181:24 numeric (1) 115:24 numerosity (1) 54:24 NY (14) 2:23;4:4,12,23;5:5, 15,23;6:5,15;7:5,21; 8:6,15;9:4 O oath (1) 186:6 object (1) 180:14 objection (13) 19:3,5,8;127:11; 132:10,24;135:12; 136:15;143:13,14; 160:13,17,24 objections (5) 127:10;146:16; 201:23;202:5,15 objective (1) 152:1 obligated (2) 20:2;98:5 obligation (2) 41:11;54:8 observation (5) 42:10;65:11;66:7; 94:3;192:12 obtain (11) 103:4;118:16; 131:14;171:6,8,8,9, 10,12,25;172:7 obtained (1) 66:19 obtaining (3) 64:10;65:14;145:7 obtains (1) 88:11 obvious (4) 16:14;20:22;33:15; 125:20 obviously (7) 48:19;83:1;93:7; 106:22;138:4; 151:22;203:4 occurred (3) 47:13;96:8;136:9 occurring (2) 136:6;151:2 Ocean (3) 166:1,3,4 o'clock (2) 202:3,5 October (8) 32:18;33:6;51:8; 76:7;81:20;92:9;	150:9;174:20 odds (1) 31:14 off (4) 32:23;54:16; 113:22;181:22 offer (8) 55:9,10;93:2,3; 135:9;138:12; 146:18;193:7 offered (4) 59:8;133:24; 134:11;146:15 offering (8) 80:20;133:1,2,4, 10;137:23;193:3; 199:17 office (6) 37:6,7;60:13,14, 22;201:19 officer (16) 97:5,6,8;109:21; 110:1,3,4,19,22,23; 111:1,3,5;113:16; 126:20;129:6 offices (3) 23:2;37:16;56:19 official (1) 60:16 often (3) 63:21;161:18; 172:3 old (1) 54:3 once (13) 18:17;24:19;25:23; 29:3,21;93:1;95:23; 99:13;129:25; 134:14;138:3,7; 141:15 One (110) 5:4;12:1;13:2; 15:7;18:23;19:10; 27:13;30:16;31:19, 22;32:9;33:16;34:2; 38:1;39:21;40:23; 41:1,23;42:1,24;44:1, 21;46:7;48:5,6;49:7; 54:5;55:1;57:16; 58:16;59:12;60:25; 61:15;64:1;65:4,5, 21;67:6;70:13,14; 71:20;74:14;76:2,19, 22;77:21;79:24;85:8; 90:7;93:18;95:2; 97:25;98:11;100:1, 21,24;103:9;108:10; 112:1;114:8,18; 115:11;122:21; 123:11;124:11,23; 133:18;134:8; 136:13,17;137:19; 139:2;141:10;	154:22;156:10; 157:18;162:24; 164:1;166:1,6,19; 170:23,24;172:16; 175:16,17,18;177:25; 178:16,16,22;181:19; 184:20;188:25,25; 190:12,25;191:3,7, 18;192:12;194:22; 195:24;196:1; 197:15;198:17; 199:11;200:12; 203:16;204:20 ones (3) 72:10;128:16; 191:14 one-third (2) 162:6,9 one-thirds (1) 172:4 one-week (1) 183:3 ongoing (1) 203:21 onion (1) 105:17 only (49) 16:5;17:13;19:10; 30:16;32:8,9,10,15, 17;33:13;36:13,14, 15;37:24;39:22;40:5; 45:15,16;49:4;58:21; 61:13;62:3;67:9; 68:2,4,5;69:24; 74:14;88:17,19; 89:15;92:2;93:12; 94:19;108:24; 118:19;123:19; 131:10,12;135:16; 142:7,13;144:8; 153:22;163:5; 165:22;193:14; 194:22;203:3 onto (2) 126:8;187:8 open (9) 14:21;64:21,24; 65:6,7,11;142:9,10; 196:10 opening (10) 10:19,24;17:14; 19:18,20;69:8;80:12; 90:9;99:18;124:5 openings (2) 17:16;79:25 openly (1) 71:7 operate (1) 125:4 operating (5) 110:6,22,23;111:1; 118:15 operation (1)	102:12 operations (5) 112:8,11;113:6,16; 114:20 operations@escribersnet (1) 2:25 operator (1) 117:17 operators (2) 137:16;144:6 opinion (8) 74:3;92:15;158:17; 161:15,21;195:16; 198:20;199:17 opinions (5) 66:18;69:5;161:13; 188:24;189:5 opportunities (1) 59:14 opportunity (11) 58:2,11;59:5,9,11; 66:20;69:2;92:8,17; 163:7;170:20 opposed (6) 65:7;77:19;94:16; 135:14;136:18; 198:24 opposite (2) 45:10;88:6 option (14) 54:21;138:2,5; 140:23;141:4,7,8,11, 20,24,25;142:2,6; 170:21 optionality (1) 103:22 options (1) 13:21 Oracle (1) 8:3 orbit (1) 110:12 order (12) 55:14;63:24; 118:16;120:3; 122:22;124:5;125:4; 163:19;172:7; 174:17,24;175:6 orders (2) 25:5;53:25 Ordinarily (1) 18:8 original (2) 38:13;77:20 originated (1) 184:11 others (14) 12:20;20:25;21:5; 30:13;63:18,20; 67:18;132:5;137:10; 153:21;154:10; 180:11;186:14;187:2 Otherwise (5)
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84:12;95:16;160:9; 161:19;191:14 ours (1) 103:6 ourselves (1) 200:25 out (107) 14:8,13;17:2;23:2, 11;24:1,17;29:12; 30:23;31:17;35:5; 37:19;40:15;44:11; 47:17;49:15;50:19; 51:3;52:11,17,23,24; 53:2;56:3,21;57:19; 58:9,16,17;60:20; 61:2,10;62:16,17; 63:4,11;64:21,24,24; 65:6,7,10;67:6; 68:17;70:12,21; 72:13;73:16;76:22; 77:1,2,11;78:18;79:4, 7;83:2,16;85:13,17; 86:25;92:2,14;99:17; 102:18;103:15; 105:22;110:5; 112:12;113:17,20; 118:17;119:16,19,19; 122:16;128:24; 129:2;140:11; 145:10;146:10; 163:23;167:1,17,18, 20;173:14,16,21; 175:2;184:7;191:20, 24;192:11;193:10,14, 19;195:17;196:15; 197:13;198:5,13,23; 201:18;202:11,15; 204:18,23 outbidded (1) 65:17 outcome (7) 12:7,7;20:10; 27:15;66:2;162:16; 164:10 outcomes (2) 66:7;194:25 out-of-court (1) 159:14 outreach (1) 169:8 outside (8) 21:25;34:14;45:16; 60:22;163:25;165:4, 8,10 over (22) 13:11;18:20;37:19, 20;40:18;43:16,21, 23;47:18;57:4;60:3; 68:17;81:6,8;99:1,2; 105:15;132:1; 136:22;151:18; 188:8;189:23 overall (6)	12:2;13:1;103:11, 25;111:4;178:23 overflow (2) 10:3,6 overlap (1) 31:18 overriding (1) 151:25 oversight (1) 158:15 overwhelmingly (2) 31:14,21 owe (1) 57:12 own (25) 24:2;29:3,13; 32:14;38:22,24; 39:17,18;47:23;48:2; 58:12;62:13,18; 67:25;70:10;76:17; 80:6;85:8;91:3,23; 99:2;163:19,24,24; 193:10 owned (7) 38:23;39:4;40:23; 70:4;71:7;105:25; 166:7 owner (2) 30:7;198:14 owners (2) 155:6;197:14 ownership (9) 33:9;85:5;91:13; 132:9,14;135:8; 137:11;198:7,8 owning (3) 162:6;163:11,14 owns (4) 85:14;151:15; 164:25;165:5	24:7;125:24 pairing (3) 29:10;125:12,18 papers (3) 85:5;88:14;94:12 par (1) 64:17 paragraph (5) 143:22;146:24; 148:16;155:3,4 parameters (1) 139:5 parent (2) 100:16;105:21 parent's (1) 100:18 Park (3) 5:4,14;7:12 parking (2) 46:20,21 part (21) 12:10;13:6;30:20; 48:11;59:13;62:20; 66:12;103:9;111:25; 115:8;127:2;135:5; 148:25;149:2,3,6,9, 11;175:5;178:12; 184:9 participant (1) 135:22 participants (2) 135:20;168:10 participate (7) 161:20;190:4,6,10; 191:13,14,15 participated (1) 135:2 participating (3) 135:4;189:24; 190:15 participation (1) 116:20 particular (5) 20:8;24:4;44:23; 177:14;192:17 particularly (4) 83:11;125:9; 163:17;196:3 parties (19) 21:11;30:9;54:3,3; 59:16;71:19;72:12; 73:15;75:9,12;83:12, 13,17;84:11;87:24; 105:13;106:16; 160:3;184:1 parties' (1) 160:16 Parties-in-Interest (5) 185:17,20,24,24; 186:10 partner (4) 23:24;24:5;29:12; 108:25	PARTNERS (5) 2:4;6:3;31:9; 73:12;195:13 partnership (4) 116:23,25;140:22; 144:8 party (9) 15:21;16:1;26:7; 56:9;75:21;101:13; 102:6;164:3;166:24 party-in-interest (2) 55:14;164:5 party's (1) 75:24 pass-through (1) 83:3 past (5) 24:14;25:22;91:19; 94:19;151:18 path (4) 118:6;173:16; 174:3,6 paths (1) 173:21 pattern (2) 17:24;20:6 Paul (1) 194:5 pause (4) 96:17;99:16;139:6; 189:10 pausing (1) 99:16 pay (9) 37:22,22;54:18; 62:6;66:3;106:11; 164:23;193:11;199:7 payments (1) 103:10 peculiarities (1) 121:15 peeled (1) 105:17 penalty (1) 185:12 pendency (1) 196:17 pending (2) 30:10;147:13 Pennsylvania (1) 111:18 penny (1) 70:14 people (37) 22:18;36:22,25; 37:2,4;48:23;49:14; 50:2,24;56:25;57:6; 61:9,14;62:1,1,16; 67:9;84:14;86:10; 87:5;102:14;139:2; 162:1;164:12;172:9; 190:22;192:6,23; 194:2,7,7,21;195:25;	197:17;199:5,7,16 per (1) 193:9 perceived (2) 103:24;164:10 percent (6) 33:9;76:19;108:10; 124:23;162:14; 163:20 percentage (1) 151:16 perception (4) 62:21;63:2;67:25; 194:10 perceptions (1) 160:21 Perella (1) 92:15 performed (1) 94:7 perhaps (4) 51:4;123:5;190:2; 204:15 period (18) 67:14,21;102:25; 130:3,5,10,10,11,20; 131:5,7,15;134:22; 140:4,9;174:22; 175:1;203:4 perjury (1) 185:12 permission (2) 118:15,18 permitted (4) 22:1;55:10;65:9; 95:16 person (27) 13:3;27:1;45:15; 55:11;62:23;70:5,7, 7;81:17;86:8,8,18,19; 88:11;93:18;102:19; 126:9;129:9,23; 137:14,15;160:23; 164:24,25;175:8,12; 198:3 personal (51) 23:17,21;26:5,12; 28:18;31:24,24; 32:16;33:17,19,20, 22;34:1,1,5,12,16; 35:4,5;36:8,22,24; 37:3,3,3,7,18,21; 38:25;46:10,25;47:1, 9,12;56:20;57:5,8; 58:12;60:7,14,17,24; 75:7;85:14;88:16; 90:25;91:2;94:9; 97:2;98:4,19 personality (1) 102:20 personally (15) 22:4;29:21;31:16, 21;34:19,25;35:13;
	P			
	package (2) 26:12;28:21 Page (20) 2:20;40:5;48:5; 94:13;126:8,8; 143:19,23;146:25; 155:2,4;167:4;183:1; 185:15,16,19,20; 187:4,7,8 pages (2) 32:22;73:23 paid (8) 62:7;66:16;76:23; 83:20;165:1,6; 194:22;195:20 paint (1) 174:3 pair (2) 68:1;125:5 paired (2)			

39:3,9,19;43:17; 46:17;76:16;96:23; 169:15 personnel (2) 132:4;133:6 persons (2) 128:25;153:8 perspective (8) 115:15;118:5; 133:9;162:22; 165:10;193:4; 197:13;202:10 persuade (1) 73:25 pertinent (1) 115:14 ph (2) 52:12;194:5 Phil (5) 49:14;51:9;148:8; 150:15;204:3 PHILIP (2) 5:7;49:9 phone (4) 15:7,9;56:19;116:5 phones (3) 23:3;25:13;37:16 phrased (1) 137:5 phraseology (1) 171:4 phrases (1) 192:5 picked (2) 84:7;86:19 piece (2) 122:2,2 piercing (1) 56:14 pin (1) 54:4 pitch (1) 138:5 place (5) 72:5;103:9;116:21; 188:9;194:4 placed (3) 22:9;25:21;46:21 places (1) 41:14 plain (6) 46:20;80:1;84:24; 85:1,21;107:7 plaintiff (2) 17:22;75:21 plaintiffs (8) 19:18;61:16;68:9; 24:93:4;97:24;109:5; 157:1 plaintiff's (11) 62:20;74:8;79:22; 107:24;126:5;127:9; 14;142:22;143:17;	145:23;155:2 plan (50) 11:4;12:4,11,12, 13;13:4,8,22,24;28:1; 41:4,6,9,15;54:17; 64:15,16;68:17; 79:22;101:3,5; 102:22,24;107:6; 130:6;131:16; 137:25;146:20; 155:8;164:4;172:5,6, 10,12,15,22,24,25; 173:2,4,8,11,15,15; 174:14;178:12; 202:23;203:18; 204:11 planner (1) 37:4 planning (4) 72:18;112:8,25; 113:8 plans (3) 55:4,6;112:12 play (1) 193:25 played (2) 40:15;67:6 player (1) 162:18 playing (4) 163:13;164:14; 190:13,18 Plaza (1) 5:22 pleadings (2) 53:20;55:7 Please (19) 10:2;71:17;91:11; 108:19;109:9,11; 111:12,20;136:24; 139:8,12;156:5,24; 157:4,6;181:6,8,10, 12 pleased (1) 124:2 pled (3) 16:2;74:7;108:1 plot (1) 66:14 plotted (1) 68:17 plus (1) 103:14 pm (8) 108:17,17;156:22, 22;187:5;202:10,11; 205:10 podium (1) 13:10 point (95) 13:21;15:1,11; 20:3;22:10;25:22; 26:7;30:16;31:17,22;	32:7,14;33:11,14,21; 34:7;35:3,15;36:22; 37:13,13,25;38:20, 20;39:25;40:14,20, 22;41:18;42:2,2,7; 44:21;46:7;47:15; 48:5,6;49:8;51:6; 52:14,15;53:1,7,8; 58:5;65:8;68:5;72:8; 76:19;78:4;81:20; 89:3,12;93:20; 101:21,22;105:24; 106:1;113:9;118:12; 121:8;127:8;128:1,2, 7,20,21,22,25;129:1, 9,11,12,14,20,23; 130:25;131:1,9,10, 12;139:12;153:2,4, 22;155:5,10;172:16; 182:14;183:11; 197:19;199:11,15; 201:21;203:16 pointed (4) 78:18;92:2;101:23; 146:10 pointing (1) 97:23 points (9) 15:19;28:24;31:19, 19;42:1;63:24; 100:23;141:1;199:10 Point's (1) 132:17 pole (2) 21:1;65:16 policies (3) 76:11;91:9,17 policy (5) 76:12;91:12;95:8, 15,17 polished (1) 28:20 pool (1) 191:18 poor (1) 30:21 pops (1) 184:22 portfolio (1) 47:5 posed (1) 55:24 position (48) 14:22;21:1;23:11; 25:3;26:10;30:12,22; 33:8;36:12;39:24; 46:15;65:14,16;90:3; 91:12;93:7;110:20; 128:12;134:11; 138:12;157:13; 161:11,16,17;162:4, 5,11,12,20,20; 163:11,16,16;164:20,	20;165:1,1;170:8,9, 19;171:2,5,13,19,21, 25;174:5;194:14 positions (12) 20:9;26:21;57:1; 69:23,24;90:16; 93:21;111:9;130:25; 170:5;172:7;183:4 positive (7) 175:13;180:5,7,12; 182:3,11;197:2 possibilities (2) 11:12;12:22 possibility (4) 24:11;68:8;147:14; 180:9 possible (5) 48:12;61:23;147:9; 180:6;198:7 possibly (3) 32:15;151:21; 152:7 post (1) 13:5 poster (1) 105:9 post-merger (1) 113:9 post-petition (1) 66:4 potential (32) 24:10;48:10;54:15; 88:17;92:3;105:20; 132:8,8;137:21; 138:20;161:19; 162:17;163:5,12,25; 164:17;169:18,21; 170:23;174:6; 175:15;177:17; 178:9,11;185:16,24; 190:14;191:12; 195:11;196:15,18; 198:14 potentially (4) 12:25;39:13;164:4; 198:22 power (3) 36:18;47:7;85:11 PowerPoint (2) 40:3,4 PR (1) 162:24 practitioners (1) 162:6 prearranged (1) 92:11 precedent (1) 64:19 predecessor (3) 114:9;117:20,22 predicates (1) 10:22 predictions (1)	52:16 prefer (1) 32:25 preference (1) 141:15 Preferred (4) 4:2;23:14;40:7; 155:10 preferreds (1) 193:16 preliminary (2) 18:3;147:6 premise (2) 45:8,8 premised (1) 100:6 preparation (1) 195:12 prepare (2) 202:14;203:8 prepared (3) 24:2;29:13;201:20 preponderance (2) 75:19;90:9 presence (13) 101:16;102:10,17; 173:13;177:2,10; 178:3,5;190:5; 196:22;197:2,6; 199:2 PRESENT (5) 9:11;109:3;137:14; 146:5,6 presentation (3) 25:24;132:3; 141:10 presentations (1) 76:1 presented (3) 31:3;69:1;92:18 presently (1) 125:22 president (4) 25:10;113:4,7,11 press (14) 10:6;38:16;47:25; 62:14,18;63:5;102:7, 13;128:13,15,17; 129:25;198:18,20 presumably (4) 89:21;186:4,13; 195:19 presumption (1) 163:18 pretty (3) 84:5;88:21;135:13 prevail (1) 100:8 prevent (2) 20:21;172:1 prevented (1) 21:15 preventing (1)
---	---	--	---	--

24:16 preverbal (1) 27:7 preview (1) 28:24 previewed (2) 11:2;82:6 previously (2) 68:14;91:1 price (11) 30:19;55:9;61:23, 24:62;7:92;24; 105:18,22;164:23; 193:2;195:20 prices (1) 66:16 primarily (2) 45:5;114:16 primary (1) 119:5 primed (1) 71:23 principal (7) 49:9;93:11,23; 99:11;100:13; 161:24;186:19 principally (1) 157:18 principals (1) 181:19 principle (1) 84:9 principles (1) 107:9 Prior (5) 29:8;37:11;96:9; 128:23;129:22 priority (1) 122:19 private (3) 62:2;158:6;192:17 privilege (3) 22:6;73:11;184:9 privileged (1) 145:4 privy (1) 72:10 probability (3) 148:17,23,24 Probably (16) 159:16,19;163:1,2; 171:14,16;177:12; 179:2,17,22;186:13; 191:4;193:18; 199:15,15;204:5 problem (4) 15:25;45:13; 123:18;136:21 problems (3) 59:21;146:22; 178:15 procedural (1) 10:22	procedures (3) 174:17,23;175:6 Proceeding (12) 2:4;11:15,17;12:8, 10,25;15:22;16:1; 81:17;104:8;119:6; 121:4 proceedings (6) 31:4;115:17; 158:20;159:1;168:6; 205:10 proceeds (1) 122:17 process (42) 15:25;53:20;54:23; 56:1;121:8,18; 131:20,21,22,23,25; 144:9,18;159:9; 160:22;161:19; 162:19,23,23;163:7; 164:4,14,15;166:17; 170:12,17;171:20; 173:17;176:14; 178:13;188:17; 189:25;190:6; 194:15,16;196:21; 197:6,21;199:1,3,6; 202:18 processes (11) 159:7,11,14,18,23; 160:6,7,7;161:22; 164:6;190:7 procurement (1) 75:23 produce (1) 184:8 produced (3) 23:5;90:20;176:5 professionals (1) 62:13 proffer (1) 160:11 profits (2) 11:22,22 program (2) 111:23;113:21 prohibited (1) 20:16 prohibition (1) 55:8 promise (2) 88:16;91:10 promoted (1) 113:5 prompt (3) 102:8;183:8,12 prompted (1) 102:8 promptly (1) 187:14 proof (3) 31:4;74:12,15 proper (1)	59:10 properly (1) 16:8 proponent (1) 54:17 proposal (22) 86:12;107:22; 123:17;141:6;142:7, 9,13,13;168:17,21, 24;169:2,6;175:25; 176:4,6,7,13,15,16, 20,22 proposals (4) 142:12;175:11,15; 176:11 propose (2) 64:15;86:17 proposed (4) 54:15;140:21; 141:23,25 proposing (1) 137:24 propositions (1) 84:19 protect (3) 22:17;54:14; 122:22 protected (1) 122:22 protecting (1) 107:3 protection (5) 77:4,5,6;78:19; 122:8 protections (5) 54:14;71:20;72:5, 8;172:1 protocols (1) 45:1 prove (3) 66:11;73:2;90:9 provide (5) 26:23;103:13; 122:12;124:4;193:15 provided (2) 11:3;186:3 Providence (1) 155:7 provides (2) 86:6;110:10 providing (1) 128:21 proving (4) 56:15;74:17;75:19; 93:14 provision (11) 71:21;80:2,22; 86:6,11;88:12;89:14; 104:18;106:18; 107:20,21 provisions (11) 20:13;71:6,24; 171:23;172:2,3,8;	175:2,4,5,5 proximate (1) 90:11 proxy (1) 27:25 PSA (2) 30:15;174:23 pseudo-factual (1) 160:15 public (20) 44:23;54:8;57:9, 11;60:11;61:8;64:21; 67:7;69:17,17,18; 71:21;76:8;78:17,23; 122:18;140:25; 174:23;179:18,24 publicize (1) 61:25 publicly (3) 67:6;174:15; 179:25 pull (1) 110:16 pulled (1) 23:6 punish (1) 59:23 purchase (22) 23:11,13;24:24; 25:3,3;26:10,19,22; 27:13;30:18;38:9; 40:11;41:5;51:6; 77:9;83:6;91:3; 106:19;128:10,14; 135:9;155:10 purchased (8) 23:12;24:13;34:4; 35:13;90:25;92:24; 128:7;164:21 purchaser (5) 22:18;81:5;85:23; 86:1;106:5 purchases (26) 11:23;21:4;23:16, 18;26:1,3,15,17; 27:18,19;29:15;30:4; 34:9;65:9;77:16; 78:2,11;81:14,15; 91:5;92:20;93:6; 129:1,9,24;132:17 purchasing (5) 20:13;26:9,18; 128:2,21 pure (2) 75:3;104:9 purely (1) 104:7 purported (1) 98:21 purportedly (1) 37:21 purpose (7) 22:12,20;72:5;	119:2,6;134:2; 179:13 purposes (5) 14:19;20:10;28:7; 97:10,11 pursuant (2) 13:22;172:22 pursue (4) 92:13,16,22; 134:13 pursued (2) 170:21,24 pursuing (2) 23:23;29:8 push (1) 204:23 put (35) 21:1;28:8;30:22; 33:24;43:11;46:5; 47:4,5;74:22;77:13, 19;82:16;83:4,7; 86:1,3,13;89:14; 91:11;93:10;100:5; 102:3,18;103:8; 104:10,25;107:15; 110:14;122:16; 125:18;163:3; 184:22,24;188:10; 202:9 putative (2) 105:21;160:22 puts (1) 98:4 putting (4) 39:14;74:3;99:2; 122:13
Q				
qualification (1) 159:9 qualified (2) 34:3;159:3 qualify (1) 161:2 quantify (1) 101:10 questioner (1) 179:6 quickly (3) 15:19;22:19;63:21 quite (6) 16:16;33:23;37:17; 79:21;89:2;130:22 quote (1) 32:19 quoting (2) 47:20;48:10 QUSBA (1) 4:25				
R				

RACHEL (3) 6:18;9:6;53:17	42:24;44:6,21;45:15; 47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	108:17;156:22	135:20;167:4	remarks (1) 31:10
radio (1) 112:24	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	recipient (2) 17:15;98:3	regarding (3) 92:20;145:7; 189:25	remedies (1) 11:19
radio-type (1) 112:11	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	recitation (1) 106:4	registration (1) 22:15	remedy (5) 11:21,25;12:9; 59:19;90:4
raided (1) 47:2	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	recognize (3) 126:12,15;127:2	regulatory (9) 52:3,4,6;67:9; 103:13;118:3,5,20; 147:8	remember (20) 40:21;43:1;105:25; 138:20;153:2;154:9; 159:10;165:19; 166:15;169:24; 170:6;173:10; 175:22;176:2;179:8; 180:3;185:5;186:23; 196:13;199:8
raise (5) 109:8;131:24; 132:2;157:4;193:11	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	recognized (2) 24:10;49:5	reimbursement (1) 175:4	
raised (2) 97:20;178:4	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	recollection (3) 176:19;179:3; 198:3	reimbursing (1) 70:13	
raising (1) 177:23	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	record (10) 25:24;53:17;69:17; 79:20;104:25; 108:23;109:16; 133:15;189:17; 200:17	rejected (4) 87:17;93:24;94:3; 107:22	
ramped (1) 66:19	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	records (1) 144:14	relate (1) 55:16	remind (1) 28:22
ran (2) 131:23;194:5	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	recorded (3) 143:7,9;146:8	related (1) 95:20	remotely (1) 36:4
ranch (1) 61:1	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	recover (2) 42:14;151:22	relates (3) 38:13;106:8;144:2	removed (1) 121:11
rather (2) 47:1;123:20	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	recovery (2) 70:17;193:15	relating (5) 13:8;32:10;118:3; 128:13;203:18	Reorg (1) 15:13
rational (1) 70:8	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	recycle (2) 36:20;47:7	relationship (6) 37:11;60:21;93:13; 141:2;177:22,25	reorganization (3) 130:6;137:25; 155:9
rationale (1) 62:4	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	red (1) 106:25	relationships (1) 107:10	repaid (2) 63:24;78:7
Re (4) 98:20;183:3; 184:24,25	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	redacted (3) 71:25;145:1,3	relative (2) 165:4;193:7	repeat (3) 150:13;153:15; 154:5
reach (6) 52:22;130:5,11,16; 141:19;161:13	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	redirect (3) 154:21,23;199:25	relax (1) 181:7	rephrase (1) 178:8
reached (6) 72:8;103:19;104:8; 140:11;145:10; 187:12	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	reduce (1) 149:3	relayed (1) 32:12	replies (2) 183:6,8
react (1) 183:19	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	refer (5) 31:11;47:12;141:8; 166:24;187:4	release (14) 104:17,18,21; 105:3,10,12,23; 106:5,7,12,18,21,24; 108:9	report (5) 129:7;137:1; 144:11,12;147:11
read (13) 19:25;41:16;51:14; 67:12;81:17;82:25; 134:6;182:12,23; 185:8;197:15,16; 201:24	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	referenced (3) 11:14;14:6;203:20	released (1) 105:14	reported (7) 43:14;130:24; 142:15;146:25; 155:5;197:23;198:23
reading (1) 70:8	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	referred (3) 110:8;122:9; 190:12	releases (3) 104:11;105:10; 106:17	reporter (2) 102:6;154:1
reads (4) 143:25;144:5; 146:25;155:4	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	referring (4) 132:4;192:15; 197:22;198:11	relegate (1) 73:23	reporting (3) 76:9;144:2;155:13
Ready (1) 109:12	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	refinance (1) 199:19	relevant (9) 80:1,21;98:9; 104:13,15;106:14,15; 115:14;174:1	represent (1) 73:11
real (6) 17:4;60:20,25; 142:7;159:20;163:13	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	refinancing (3) 145:11;147:2,14	relied (1) 90:14	representative (1) 188:15
reality (1) 55:7	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	reflect (1) 168:9	relief (1) 63:15	representatives (3) 56:5,5,6
realized (3) 11:23;22:15; 103:20	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	reflected (2) 13:23;144:23	relies (1) 62:20	represented (4) 83:22;159:24; 160:1,3
really (46) 10:11;18:15;23:7; 33:16;38:20,21;	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	refused (1) 45:23	remain (1) 112:17	representing (3) 86:5;150:5;186:10
	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	refute (1) 31:20	remains (1) 147:20	reputational (1) 162:24
	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4	regard (5) 48:12;54:6;75:10;		request (5) 98:3;124:22; 136:13,16;147:8
	47:3;50:22;60:1,12; 62:16,17;63:9;69:13; 15;75:4;76:3,18; 85:17;94:4;106:9; 117:19;119:3; 121:18;123:2,4,15; 125:17,24;134:13; 137:23;138:8; 159:19;163:21; 183:6;188:10; 191:20;192:15; 193:9,21;195:14; 204:4			

January 9, 2014

requested (2) 79:19;120:23	114:19	revolving (1) 54:4	54:6;56:8;63:12; 89:4;117:18;118:14; 171:22;173:15	runs (1) 159:19
requests (1) 144:18	responsible (4) 27:1;45:19;110:4; 113:21	rewrite (2) 80:5;82:24	rise (5) 17:13;88:17; 108:18,24;156:23	rush (2) 96:15,16
require (4) 12:6;93:18;104:20; 114:17	rest (3) 70:17;96:11;112:3	RF (3) 112:23,23;113:8	risk (19) 36:16,17;47:1,3,6; 65:24;70:14;77:7,8; 78:14,15;92:13;94:9; 97:3;99:3,9;103:24; 107:15,15	S
required (3) 54:7;67:7;191:2	restate (1) 95:7	rich (2) 102:19,20	risk-free (1) 79:1	SABIN (1) 5:17
requirement (5) 120:13,20;121:11; 123:12;130:15	restrict (2) 20:13,20	Richard (1) 38:12	road (2) 55:5;173:16	safe (2) 125:14;197:4
requirements (2) 76:9;124:13	restricted (1) 20:19	Ridings (1) 52:12	roadshow (7) 131:23,25;132:7; 13,15;133:7;137:15	safety (1) 122:18
requires (2) 76:12;88:2	restriction (11) 81:4,12,13,16; 83:19,23;84:3,16; 85:19,22;86:23	right (200) 10:3,10,15;13:3; 14:1,2,2,15,20,22,23; 15:3,16;16:11,22; 17:1,6,6,8,18;19:4,9, 16,25;34:4;35:13; 39:25;40:25;42:3,6,9, 16,20,21;43:9,12; 44:4,18;51:15;53:13, 14;57:17,18,21;58:3; 73:16;74:20,24;75:4, 14;76:21,21;77:8; 78:11;89:6,22;95:18, 25;96:3;99:23;100:2; 101:21;105:5,21; 108:5,6,20;109:4,7,8; 119:1;124:19;125:2; 127:12;131:16; 132:15,25;134:4; 136:4,23;137:2,7; 138:16,23;139:15; 140:20;142:17,19,20; 143:15;150:2,10,12, 16,19;151:2,16,17; 152:20,24;153:3; 154:3;155:17;156:6, 25;157:4;160:8; 161:2;165:24;166:2, 8,14,23;167:3,6,13, 22;168:4,12,15,18, 23,24;169:1,3,6; 170:24,25,25;171:2, 13,15,18,25;172:7,8, 13,19;174:16,20,24, 25;175:6,16,18,21; 176:1,3,4,9,11;177:7; 180:1,7,8;181:2,9,23; 186:5,6,15,21; 187:19;189:13; 190:12,15,19,21; 191:2,7,9,18,21,21, 22;193:24;194:19; 195:11;196:4,14,19, 23;197:7,24;198:7,8, 9,12,15;200:1; 201:22;202:20; 203:7,9,13,15;204:9, 16,18;205:2	roadshows (2) 132:20;134:15	sale (19) 30:10;54:23; 128:18,19;160:7; 161:19,22;162:23; 170:10,16,19,21; 178:12;190:6,7; 197:6;199:1,3,6
Research (2) 15:10,13	restrictions (18) 21:6,14;23:10; 24:15,23;46:22; 48:18;58:15;76:3; 80:2,6,10,18;82:23; 87:4;89:20;107:8; 123:1	ROBERT (4) 7:25;15:17;73:10; 150:5	ROBERT (4) 7:25;15:17;73:10; 150:5	sales (8) 159:11,14,17,23; 160:6;162:19; 166:17;170:20
reserve (1) 56:8	restricts (1) 88:10	robust (1) 116:22	role (14) 14:11,12;15:7; 21:22;59:22;110:1, 21;111:3;113:7,12, 15;130:9;150:8; 178:8	same (20) 21:11;25:19,21; 39:15;49:11;50:21; 51:2,20;62:6;70:16; 77:22;120:10;121:5; 132:24;137:21; 141:5;162:15;167:4; 190:10;203:20
reserved (1) 63:11	restructuring (7) 12:2;103:7;157:15, 17,22;158:8;160:24	roles (2) 113:3;114:18	Roberto (1) 51:22	SANDY (1) 4:25
resides (1) 121:25	restructurings (1) 158:4	room (10) 10:4,4,6,7,8;11:9; 12:20;19:1;80:3; 164:2	rooms (1) 205:7	Sanjana (1) 15:12
resolution (5) 121:7;126:21; 127:2,5;152:11	rests (1) 79:13	Rule (9) 17:14;19:2;54:7; 55:13;80:15;118:10; 119:2;121:5,8	rules (15) 18:14;55:16;57:11; 59:3;81:5;94:18; 119:8;120:16;121:3, 6;136:1;172:4;194:6, 8,11	satellite (14) 26:9;39:16;110:6, 7,8,11;117:18; 118:16,19,19;119:10; 120:13,18;159:22
resolve (4) 104:24;123:18; 130:12;138:11	result (5) 11:19;30:2;84:1; 111:8;124:22	rumor (1) 96:23	rumors (4) 27:3;47:14;49:12; 130:1	satellite-based (3) 110:10;114:25; 117:17
resolved (4) 119:13;144:19,21; 202:5	resulting (1) 160:9	run (9) 23:1,2;30:18;37:5; 39:1;108:7;138:1; 161:22;194:5	running (1) 157:19	satisfied (1) 11:5
resort (1) 94:15	results (3) 11:21;54:3;161:18	run (9) 23:1,2;30:18;37:5; 39:1;108:7;138:1; 161:22;194:5		satisfy (2) 31:3;74:17
resources (1) 25:7	retail (1) 159:21			sats (1) 51:25
respect (28) 12:7;14:18;16:15; 23:21;26:19;27:25; 67:24;75:11;89:3; 93:16;105:24;117:6; 132:9;134:24; 144:18;159:7; 161:13;169:1; 171:22;173:15; 178:14;184:2; 190:25;196:16; 197:10;201:8,23; 203:21	retention (1) 185:12			Saturday (1) 184:6
respected (1) 103:6	return (1) 163:22			saw (6) 40:4,14;172:16; 190:23;192:21; 193:25
responded (1) 25:2	returning (1) 72:16			saying (23) 33:23;37:17;44:3; 46:12,13;48:25; 49:17,18;50:13;63:1; 66:13;67:12;71:3; 89:6,23;97:15;102:5; 133:18;137:22;
response (12) 27:4;45:22;47:24, 25;48:1;49:15;52:19; 65:11,13;66:6;129:7; 138:8	Reuters (2) 102:5;154:16			
responsibilities (3) 98:2;110:25;115:9	revealed (1) 45:22			
responsibility (4) 111:4;113:5,12;	revealing (1) 141:1			
	review (3) 40:4;126:14; 181:14			
	reviewed (3) 146:9;162:17; 172:15			
	reviewing (1) 154:14			
	revitalize (1) 30:18			
		right-hand (1) 51:10		
		rights (8)		

153:8;182:8;186:10; 198:25 scarcity (1) 192:22 scenarios (1) 65:24 scene (1) 175:20 schedule (5) 86:9,18;185:16,21; 201:15 scheduled (3) 12:5;187:16,16 scheduling (1) 156:7 scheme (3) 21:14;23:8;30:20 school (1) 111:14 Schwartz (1) 10:13 science (1) 111:15 scooping (1) 51:24 scope (6) 80:18;93:12;98:16; 188:9,12,20 scratching (1) 53:21 screen (6) 32:19,22;33:1,24; 62:10;77:13 screens (1) 64:2 se (1) 193:9 Seaport (1) 15:14 searched (1) 23:6 seat (6) 10:2,14;108:19; 109:11;156:24;157:6 SEC (5) 76:9;178:15,17; 179:4,6 second (26) 15:5,7;16:4,18; 34:7;44:5;65:19; 68:4;83:16;88:14,15; 90:7;95:12,14;96:22; 116:6;124:12;126:8; 143:22;155:2,3; 179:1;187:8;196:14; 200:12;201:7 secondary (1) 62:7 secret (4) 76:25;77:10;78:16; 107:15 Section (3) 88:2,9;89:1	sections (2) 145:2,3 Secured (8) 4:10;13:19;54:19; 65:15;104:19; 147:24;148:13,24 securing (1) 145:18 securities (17) 20:9,17;21:4,23; 23:14;24:14,18,25; 25:6;27:14;30:5,8; 10;36:1;38:7;39:4; 54:12 seeing (2) 10:9;125:19 seek (1) 115:4 seeking (3) 63:15;117:18; 149:9 seem (1) 51:4 seemed (1) 16:13 seems (1) 59:16 sees (1) 107:19 selection (1) 131:20 sell (6) 54:3;87:6;122:17; 183:4;192:24;196:2 seller (4) 105:12;163:9; 196:3,6 selling (2) 87:5;191:5 send (2) 52:17;184:21 senior (3) 54:18;65:15; 186:19 sense (21) 13:5;28:24;38:4; 39:16,17,18;46:15, 16;62:23;64:7;68:1, 6,23,25;69:25;99:22; 104:1;125:17;136:9; 173:6,10 sensitive (1) 141:1 sent (9) 26:6;49:16,17; 71:14;72:17;126:10; 148:8;149:11;184:6 sentence (4) 143:25;144:5; 148:16;155:4 separate (8) 48:23,23;56:12,15, 16,17;58:9;69:4	separated (2) 56:21,23 separateness (3) 46:6;48:7,25 separation (2) 98:10;106:8 September (4) 86:4,15;123:23; 149:21 sequence (2) 40:16;199:8 series (2) 95:20;136:8 seriously (1) 168:10 serve (3) 35:20;36:7;196:11 servers (1) 23:6 serves (1) 21:21 services (1) 118:23 serving (1) 110:19 set (9) 22:11,19;23:11; 67:2,3;72:13;94:20; 96:8;116:20 setting (1) 70:6 settle (1) 107:10 settled (2) 24:6;107:9 settlement (1) 50:22 settles (1) 65:2 seven (5) 38:20;42:2;50:9; 55:13;158:3 seventeen (1) 112:19 Seventh (1) 6:14 seventy- (1) 33:8 seventy-two (1) 14:17 several (7) 36:5;131:21; 151:19;152:1;159:7; 175:10;179:17 sewn (1) 134:10 shall (1) 86:7 sham (1) 83:3 SHANA (1) 4:6 share (3)	85:7,8,9 shareholder (2) 25:12;98:11 shareholders (5) 65:1;70:1;76:8; 98:6,8 shares (1) 85:6 sharing (1) 48:20 sheet (3) 131:5;148:17; 149:11 SHIFF (1) 6:8 shocked (2) 51:10,18 shoes (1) 59:9 short (4) 10:18;60:3;156:10, 13 shorten (1) 45:25 shorter (1) 204:17 shortfall (1) 59:20 shot (1) 163:13 shots (2) 193:21,22 show (49) 20:23;22:22;23:7, 22;24:3,20;25:7,24; 26:5,20;28:4;29:6, 24;49:24;50:7,8,10; 52:9;73:17;74:16; 75:20,22,23,25;76:4, 5,15,17,18;83:15; 85:10;87:18;90:25; 92:1;94:22,24;96:19; 98:14;99:4,7;100:25; 101:1;103:3;153:5; 161:25;164:12; 165:8;188:22,23 showed (1) 185:10 shown (1) 107:12 shows (1) 25:17 sic (1) 166:1 side (9) 19:24;47:24;53:10; 65:22;85:12,12; 92:13;93:10;135:24 sideshow (1) 107:2 Siegel (1) 15:13 sight (1)	67:2 sights (1) 67:3 signal (1) 110:11 signed (1) 41:15 significance (1) 171:20 significant (29) 28:12;30:3;40:8; 41:11;54:11;79:8; 131:1;148:25; 161:11,17;162:11,17, 18,20;163:16;164:9, 21;165:1,2;170:16; 171:22;177:16,19,21; 194:9;197:7,14,21; 198:21 signs (1) 41:3 Silver (1) 15:10 similar (17) 21:11,12,22;53:25; 60:9;94:8;112:7; 117:16;118:6;119:6; 120:10,22;137:20; 138:8;141:23,25; 161:22 similarly (3) 22:21;115:12; 169:1 simple (1) 46:20 simply (15) 12:15,21;16:13; 18:12;29:7;33:3; 36:11;44:10,25; 77:19;78:8;81:16; 93:20;119:6;127:19 SIMPSON (1) 4:20 single (11) 16:6;20:3;31:11; 36:8;47:5;70:6; 73:20,24;91:14;94:6; 95:20 sinister (1) 105:11 sit (7) 27:6;43:2;45:23; 46:9;49:2;56:11; 166:15 sits (1) 121:19 sitting (4) 42:13;73:3;78:14; 163:15 situated (1) 115:12 situation (11) 12:23;14:17;20:11;
---	--	--	--	--

65:23;87:15;103:11; 130:22;191:11,11; 192:18;199:8 situations (3) 165:23;166:10,11 six (3) 38:20;55:8;152:21 six-month (1) 130:10 sixteen (1) 112:19 sixth (1) 37:25 sizable (2) 128:11,12 size (5) 72:25;191:1,1,11, 21 SKADDEN (2) 4:1;15:14 skeptical (1) 29:1 skirting (1) 105:15 skullduggery (1) 79:11 SkyTerra (3) 114:8,8;119:19 SLATE (1) 4:1 slay (1) 71:9 slide (11) 86:3,13,21;87:10; 88:10;91:11,11; 93:11;95:11;102:3; 103:16 Slim (4) 51:1,7;52:14,25 Slim's (1) 56:5 small (2) 131:11;191:13 smallest (1) 63:19 Smalley (1) 15:13 smattering (1) 62:11 Smith (27) 52:12,20;70:23; 72:18,18;109:6,8,16; 110:16;127:16,25; 131:13;133:22,22; 136:8,25;137:9; 139:12,21;142:24; 143:19,25;144:5; 150:5;154:25; 155:17;199:12 smoke (2) 49:14;63:4 smokescreen (1) 79:9	smoking (1) 62:16 so-called (3) 13:6;62:21;163:7 socialize (1) 60:21 sold (4) 41:1;52:18;71:12; 106:1 solely (2) 72:5;85:14 Solomon (2) 157:25;158:3 solution (2) 12:3;13:1 solutions (3) 11:12,19;13:1 solve (1) 122:15 solved (1) 123:25 somebody (15) 30:11;44:14;47:24; 49:17,18;53:3;59:23; 118:15;135:23; 136:25;171:1;173:9; 174:3;186:4;192:24 somehow (5) 41:13;45:9;53:5; 78:25;102:10 someone (12) 47:11;55:22;79:7; 87:5;105:9;135:4,15; 137:1;162:20;165:5; 186:13;198:24 sometime (5) 118:8;119:13; 168:15;174:15; 175:25 sometimes (2) 58:15;64:17 somewhere (2) 29:2;124:5 soon (2) 39:23;121:24 sophisticated (9) 80:9;82:22;83:12, 13,14;84:6,11;87:16; 107:19 sorry (20) 18:1;32:21;51:15; 95:6,14;118:13,24; 119:19;143:7;144:1; 150:13;153:15; 154:2;160:18; 169:13;180:16; 188:11;189:6;195:1; 204:1 sort (15) 33:14;44:18;45:15; 80:16;84:14;87:22; 91:22;102:9,13,16; 105:4;157:18;	164:11;165:9;192:25 sought (5) 32:9;88:7;90:10; 91:25;130:11 Sound (34) 22:10;25:22;26:7, 11;46:6;47:14;51:5; 52:13;128:1,1,7,19, 21,22,25,25;129:9, 11,12,14,20,23; 130:25;131:9,10,12; 132:17;142:18; 153:2,3,22;155:5,10; 174:20 sounds (7) 142:20;146:20; 174:16,25;176:2; 203:24;204:9 source (2) 125:22;134:19 sources (1) 52:22 SP (1) 22:20 speak (12) 26:14;31:23,24; 35:4;36:23;48:13; 133:14;141:4; 150:23;151:3,8; 166:16 SPEAKER (2) 132:11;155:25 speaking (2) 32:4;138:11 special (23) 11:7,13;12:14; 22:12,20;30:17; 45:23;48:16;66:17, 17;68:21,22;78:1,18, 23,24;92:7,10,19; 99:14;105:16;106:6, 9 specific (14) 12:6;93:16;106:13; 115:10;136:17; 140:22;141:1,17; 142:12,13,13;152:5; 169:24;191:16 specifically (10) 94:2;117:9;126:6; 128:17;130:9; 138:11;154:9;159:8, 10;180:3 specifics (1) 132:21 Spectrum (131) 20:23;23:23;24:4, 7,8;26:9;27:2;29:4, 10,11;33:19;34:17; 35:8;38:11,15,22,23, 24;39:1,4,5,11,13,13, 14,17,19,19,21; 46:17;51:24;59:12;	60:6;67:21,25; 106:11;114:17,20,23, 24,25;115:2,4,5,7,10, 11,12,16,23,24; 116:11,17,19,21,24; 117:1,6,9,18;118:14, 19;119:5,8,9,24; 121:3,14,17,19,20,20, 21,22,22;122:1,2,3,3, 4,4,6,7,9,11,14;123:2, 3,5,9,15,20,25; 124:10,10,12,14,24; 125:3,3,5,7,9,12,12, 14,14,15,19,20,21,23, 24,25;126:1,2; 134:25;135:9;138:2, 3,7;141:15,21; 144:19;149:14,17; 192:19,22,23;195:15 spectrum-based (1) 112:25 spectrum-owning (1) 34:19 speculate (4) 30:16;74:14;78:21; 97:17 speculation (19) 74:12,15,20,24; 75:3,11;77:20,24; 78:25;79:11,12; 85:14;87:13;88:8; 94:11;104:9;107:13, 16;153:19 speculative (5) 16:9;101:1,12,14; 104:7 spend (3) 35:8;53:21;163:3 spent (17) 11:7;29:2,19;34:7, 8,10,11,14;38:25; 60:6;70:10;74:2; 112:3;114:12; 115:16;158:6;195:13 sphere (1) 50:2 spinoff (2) 113:22,24 spoke (8) 32:1,2;150:21; 151:7;168:14; 173:12;176:18; 179:16 spoken (11) 49:20,20,21;151:1, 5,9,11,14;181:22,24; 182:10 sponsorship (1) 137:12 spring (1) 121:1 Sprint (19) 67:5,11,18,20;68:2,	16;92:4;112:18,21; 113:9,10,11,15,16,20, 22;140:13;141:23; 142:3 Sprint's (2) 113:13,17 SPSO (72) 11:19,23;12:1; 20:2;22:8,20;23:1,5, 7,12;26:10;27:24; 28:18;29:25;40:17, 19,25;41:4;42:12; 44:8,9;46:20;49:10; 53:18;59:21;64:5; 68:10;70:3,4,5;71:7, 16,17,18,23;72:7,24; 73:3;81:5;84:22,24; 85:8,9,14;86:20; 87:8;88:5,7,25;90:6; 100:6,6;101:16,20; 103:3,17;105:22; 106:13;139:18; 172:18,21;173:3,7, 19,23;174:7;179:18; 180:11;183:12,16,19, 22 SPSO's (11) 38:3;61:20;63:17; 70:24;71:2;102:25; 104:3;105:7;173:15; 180:2;198:7 spun (1) 113:22 Square (1) 4:3 staffing (1) 157:20 stake (4) 168:7,8;194:9,23 stakeholders (3) 14:8;30:6;195:19 stand (9) 11:11;12:21;18:17; 21:10;28:19;46:9; 49:3;59:9;107:24 standalone (3) 12:4,11;121:13 stand-alone (1) 203:18 standard (2) 168:3,4 standards (3) 54:13,17;113:7 standby (1) 21:11 standing (1) 10:13 standpoint (2) 10:22;24:5 stands (3) 12:14;112:24; 118:13 Stanton (1)
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47:16 start (14) 15:25;18:4,20; 19:17;84:13,19; 99:21;102:15;124:6; 140:8;149:13;158:8; 199:3;203:5 started (15) 17:9;22:8;47:14; 49:12,20;117:8; 118:11;119:1,12; 131:1;132:15;147:1; 157:25;199:6,12 starting (4) 14:19;17:25;20:5; 199:15 starts (4) 59:24;116:2,6; 187:7 start-up (1) 112:10 State (7) 83:11;120:16; 135:20,21,23,25; 147:5 stated (1) 57:24 statement (9) 10:18;50:3;82:17; 88:24;97:17;99:19; 191:24;192:11; 193:25 statements (7) 10:19,24;17:15; 133:3,9;134:8; 155:13 states (1) 160:16 status (1) 147:8 stay (1) 46:10 stayed (2) 112:4,18 staying (1) 115:17 steer (1) 20:10 stems (2) 17:23;20:6 step (6) 102:8;120:2;183:9, 13,23;200:15 steps (1) 128:24 Steve (2) 19:1;103:2 Steven (2) 37:10;45:17 still (12) 41:8;44:15;47:9; 52:25;68:15;96:11; 99:11;113:7;147:6;	162:15;194:23; 201:10 stipulated (1) 82:16 stipulation (4) 71:5,20;72:3; 130:14 stock (5) 40:7;48:19;91:13; 155:10;193:12 stocks (1) 47:4 Stone (31) 10:21;17:10,11,11; 19:11,14;69:7,9,10; 99:22,23;100:1; 108:21,22,23;109:3, 5;155:21;156:25; 157:1,8;160:10; 161:6;165:11;188:6, 7,8;199:24,25;200:8; 204:17 stonewalled (1) 188:2 stonewalling (1) 187:21 stop (5) 41:20;46:12,13; 56:11;89:3 stopped (1) 72:16 stories (3) 47:19;66:24;198:5 story (9) 28:17,20;47:21,22; 48:4;53:10;78:7; 102:7;180:18 strategic (35) 20:9,24;24:5,5; 29:4;35:1;102:8; 134:23;137:16; 140:22;144:8; 161:10,15;163:10,12, 15,18,22,24;164:20; 169:8;176:25;180:8, 12;182:4;192:19; 193:8,24;194:8,13; 195:11,14,16;197:8; 199:18 strategically (1) 68:7 strategies (25) 134:23;135:3,10; 137:10,18,23;140:5, 9;144:25;169:18,22, 25;170:2;183:9,13, 19,23;192:23;193:9, 10,23;195:6,8,18; 199:13 strategies (1) 42:25 strategy (11) 26:2,17;27:2;	29:16;40:8,11;48:7, 24;63:18;64:15; 113:7 STRAUSS (1) 5:2 Street (9) 2:22;7:20;8:4,13; 179:20;197:13,17,17, 22 stressed (1) 158:7 STRICKLAND (26) 6:18;53:15,17,17; 57:18,21,25;58:4,13, 23;59:1;63:16;65:12; 66:9;68:20;69:15,21; 73:6;75:5;78:17; 92:1;95:12;104:23; 200:10,12;205:8 Strickland's (1) 69:11 strident (1) 37:17 strike (1) 190:8 strive (1) 146:10 strong (1) 63:8 strongly (1) 10:6 STROOCK (5) 7:2,2,10,10;15:13 struck (2) 79:24;84:12 structure (39) 20:18,22;24:16; 38:5;58:20;62:22; 63:3;75:2;101:16; 102:11;103:8,9; 104:6;127:22; 161:12,18;162:7; 163:11;164:4,9,24; 165:23;166:12; 170:11;173:13; 176:8;177:2,6,11; 180:4,12;182:11; 183:12,16,19,22; 197:7;199:2,18 structuring (1) 83:18 struggled (1) 130:19 stuck (1) 45:7 stuff (1) 74:15 stunningly (1) 36:11 stymie (1) 54:1 sub (1) 100:6	subject (14) 121:23;126:22; 132:14;137:11,18; 159:3;161:14;178:9, 14,15;184:9,22,22,23 subjective (1) 160:21 submit (1) 28:12 submitted (4) 20:1,1;55:10;73:22 subordination (3) 11:25;89:18;90:2 subscribe (1) 199:6 subsequently (1) 121:9 subset (2) 190:10;191:21 subsidiaries (3) 20:18;86:8;89:9 subsidiary (14) 70:8;81:19,20,21; 85:2,3,4;87:2,3,6,8; 88:5;100:17;107:23 substance (1) 49:2 substantial (7) 23:13;40:7;131:8, 10;147:7;151:16; 198:14 substantially (2) 149:4;161:17 Substantive (2) 56:13;130:19 subvert (1) 70:6 succeed (1) 92:5 succeeded (1) 102:24 successful (3) 62:9;117:2;119:16 successfully (2) 24:7;120:12 suggest (1) 47:10 suggested (3) 59:19;180:11; 195:5 suggesting (1) 198:1 suggests (1) 43:24 suit (3) 48:13,17;107:1 suitable (1) 23:24 Suite (2) 2:22;8:5 SULLIVAN (11) 7:18;15:18;21:24; 22:3,5;32:2,5,9,11;	73:10;189:17 sum (1) 107:1 summary (1) 79:20 summer (10) 120:8;172:16; 176:18;177:24; 178:4,10;186:14,16, 22;187:25 suns (1) 54:11 Sunday (2) 187:5;202:12 super (1) 55:13 super-seeker (1) 66:14 supervising (1) 157:21 support (31) 11:4;12:19;13:4,8, 23,24;41:4,6,9,9,15; 66:25;75:3;77:20; 78:25;90:2;102:1; 107:12;113:4; 172:12,15,22,24; 173:2,4,8,11,20,24; 174:14;185:12 supported (1) 73:1 supporting (3) 12:12,13;82:13 supportive (1) 89:10 suppose (2) 32:25;82:16 supposed (2) 32:22;33:3 Sure (54) 10:23;32:19;33:7; 41:25;43:8,10;51:21, 25;52:19;63:4;73:15; 110:4;111:15,22; 112:22;115:22; 116:16;118:5; 122:22,23;123:23; 126:17;127:20; 129:12;130:11,22; 131:2;137:13;139:4; 145:23;151:10,13,23; 152:8;157:25; 164:13;167:2; 168:22;172:9;174:1; 175:23;176:5;178:7; 182:12;186:2; 187:23;188:13; 192:2,5,14;193:6; 195:23;199:4;200:14 surprise (1) 136:7 surprised (1) 57:4
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surrogates (1) 44:10	TARIQ (1) 6:19	21,25;118:3;119:19; 120:15	therefore (4) 65:10;89:15;98:1; 164:17	23:8;68:1
suspect (2) 28:15;56:9	team (2) 39:7;129:2	terrestrial (20) 110:6,9,13;114:24; 115:11;117:18,19; 118:13,14,17,22; 119:9,21;120:17; 121:3,6,13,13;125:4; 144:19	thereof (3) 81:19;85:2;87:2	TIBOR (1) 9:8
suspected (2) 88:5;153:21	teams (1) 10:7	terrestrial-based (1) 118:21	thesis (1) 46:18	ticking (1) 103:10
suspicion (1) 63:9	technical (6) 43:17,18;110:5; 113:4,16;122:5	test (1) 33:16	thinking (5) 29:4;58:16;63:25; 64:3;199:9	tied (1) 128:17
suss (1) 62:17	technicalities (1) 97:8	testified (16) 32:4;34:10;64:16; 145:6;149:13;153:1; 158:19;159:5,6; 175:10;177:5; 188:16;195:6; 196:17,21;199:1	third (6) 68:4;75:21,24; 105:13;160:16;179:1	ties (1) 28:21
Sussberg (20) 10:15,16,18,21,24; 11:1;12:18;13:10,13; 14:6;43:13;59:19; 108:6,7,8;202:24; 203:15,16,17,20	technically (2) 67:17;68:7	testify (8) 17:17;56:4;103:18; 156:16;159:4; 160:21;161:7,9	thirteen (3) 90:21;166:2,4	till (1) 201:9
sustained (2) 73:21;101:24	technology (2) 111:18;113:19	testifying (3) 69:19;150:24; 184:15	thirty-five (2) 123:8,19	timeline (1) 67:19
Swiss (1) 167:25	telecom (2) 159:21;195:13	testimony (33) 19:15;28:23;29:2, 18:30;25:37;11:15; 46:11;66:13;69:11; 75:7,14;98:13,22; 103:1,3;104:10; 153:2;158:23;159:2; 160:14,15,17;161:1; 170:6;188:13,21; 195:13;196:2;197:5, 23;198:1,12	thirty-five-page (1) 73:23	Times (12) 4:3;28:11;63:20; 129:10;134:16; 158:22,25,25;160:1; 163:22;181:24; 184:21
switching (1) 124:15	telecommunications (2) 114:13,15	testing (1) 33:3	thirty-three (1) 33:9	timing (4) 28:14;105:25; 176:2;204:7
sworn (2) 109:10;157:5	TELEPHONICALLY (1) 9:11	THACHER (1) 4:20	THOMAS (1) 4:14	title (1) 73:4
synergies (3) 24:10;39:20;46:18	telling (13) 18:2;27:11;47:13; 80:19;102:4,5,12; 118:24;136:12; 154:15;198:13,18,20	Thane (2) 157:19;158:10	thomsonreuterscom (1) 62:24	titles (5) 61:15,17;112:20, 22;113:3
T	tells (1) 62:15	Thanks (1) 17:6	though (12) 23:1;37:17;59:20; 75:11,11;81:1;82:25; 87:20;97:21;101:22; 103:9;182:3	T-Mobile (1) 140:17
tab (7) 181:12;182:21,22; 184:3,4;185:6; 186:24	Telmex (1) 51:7	theme (1) 152:12	thought (15) 18:2;28:24;47:3; 52:6,25;63:23;64:7, 25;98:18;127:22; 130:16;153:8,13,17; 187:23	today (20) 11:11;12:14;18:7; 41:7;45:17,18;59:24; 78:14;144:21; 147:20;149:13; 150:24;161:1,8; 183:21;195:16; 198:1;200:7;201:5, 10
table (4) 60:2;119:3,4,13	ten (8) 22:13,21;31:19; 53:23;57:8;158:9,11, 25	Then-existing (1) 135:23	thoughtful (1) 108:12	together (6) 38:21;39:15;46:5; 60:22;82:17;125:18
talk (20) 30:9;45:4;49:3,4; 62:1;71:2;80:3; 88:11;90:18;167:10, 18;168:14;177:14; 188:3;190:2;192:14; 195:24;199:21; 204:4,21	tend (2) 172:4;197:17	THACHER (1) 4:20	thoughts (1) 44:18	told (21) 21:25;25:1,17,25; 27:18;32:5,5;35:11, 12,23;57:20;75:5; 80:15;92:24;129:22; 133:23;164:2; 175:14;179:3; 183:24;202:24
talked (15) 68:21;76:2;89:1; 90:8;92:9;93:9; 99:15;100:18; 147:23;170:5;174:5; 190:24;195:6;197:1; 198:10	tends (1) 164:8	Thane (2) 157:19;158:10	thousand (1) 76:8	Tom (2) 13:18;26:25
talking (10) 14:7;62:24;77:23; 142:3;147:3;169:18; 175:22;178:22; 180:3;195:17	tenure (1) 112:21	Thanks (1) 17:6	Thousands (1) 90:20	tomorrow (13) 13:25;156:16; 200:5,6,20,25;201:9; 202:3,6,10,24;204:6, 13
talks (2) 85:7;89:9	term (7) 38:6;39:14;81:21; 115:19;131:5; 148:17;149:11	theory (19) 31:13,15;42:10; 43:9;52:5;70:5; 79:14;82:14;89:10; 90:14;93:6,7,24; 94:15;100:21,22,22; 104:6,10	thread (1) 137:20	tongue (1) 31:12
tallying (1) 70:24	terminated (5) 30:15;42:12;43:1, 13,23	theory (19) 31:13,15;42:10; 43:9;52:5;70:5; 79:14;82:14;89:10; 90:14;93:6,7,24; 94:15;100:21,22,22; 104:6,10	three (16) 15:19;23:15;33:14; 54:11;66:19;69:3; 73:23;112:4;117:19; 132:1;144:3;155:11; 175:14;176:17; 179:22;194:6	tonight (1) 204:21
target (1) 92:3	termination (9) 11:4;13:4,8,24; 16:15;43:19,22; 175:1,4	theory (19) 31:13,15;42:10; 43:9;52:5;70:5; 79:14;82:14;89:10; 90:14;93:6,7,24; 94:15;100:21,22,22; 104:6,10	three-day (1) 14:1	took (7) 35:21;36:16;66:19; 90:13;92:6;116:21;
targets (2) 67:2;160:1	terms (20) 22:1;34:1,14; 84:19;88:19;103:19, 25;106:21;125:18; 140:25;141:22; 159:2;170:14;172:5; 173:14;192:18; 194:25;195:15; 196:2;199:9	theory (19) 31:13,15;42:10; 43:9;52:5;70:5; 79:14;82:14;89:10; 90:14;93:6,7,24; 94:15;100:21,22,22; 104:6,10	threshold (1) 95:3	
	TERRASTAR (12) 64:11,22;67:1; 91:20;117:9,13,14,		throes (1) 11:12	
			throughout (3) 71:12;97:18; 121:18	
			thus (2)	

141:20 tool (4) 55:13;63:10,14; 79:14 top (4) 35:21;84:2;146:24; 184:5 topic (4) 132:20;135:8; 160:14;161:9 topics (1) 126:3 topped (1) 173:8 TORRES (1) 6:2 tort (3) 100:11,14,16 tortious (18) 16:6;73:21,24; 74:17;75:18;81:9; 84:21,23;88:23;90:6; 93:11;100:9,15,22, 24;101:13;104:13; 108:2 total (2) 112:19;123:8 totally (1) 90:14 touched (2) 190:1,1 tough (1) 52:5 towards (1) 122:18 tower (1) 116:9 towers (1) 110:15 trace (2) 111:12,20 track (2) 115:8;146:15 tracking (1) 71:11 trade (11) 22:14;25:15;73:4; 95:1,2,7,12,14;96:4, 5,9 trades (36) 20:12;22:9,11,23, 25;23:20,21,23;25:8, 11,16,21;26:8;27:25; 28:3,4,14,15;30:7; 37:20,23;40:17; 48:20;61:20;63:17, 20,22;64:6;71:4,15; 96:8,11;97:2;98:23; 130:21;131:12 trading (5) 53:24;54:1;104:3; 130:24;131:11 transaction (25)	41:10;43:13;65:7; 66:17;68:21;76:13, 20;78:18,24;83:18, 19;91:15;92:7,10,14, 19;95:20,23;99:14; 105:16;107:14; 135:24;191:21; 196:9,10 transactional (2) 65:8;90:24 transactions (17) 57:10;64:10;65:3; 67:10;91:21,22; 92:22;93:16,17,17; 94:8;95:20;96:19,25; 97:1;161:23;169:21 Transcribed (1) 2:20 transcript (1) 104:2 transcripts (2) 17:16;69:16 transfer (23) 76:3;80:2,6,10,18; 81:4,12,13,16;82:23; 83:18,23;84:2,16; 85:19,21;89:20; 107:8;120:1,3,6,9,25 transition (2) 122:8,12 translates (1) 60:11 transmits (1) 116:5 transmitter (1) 116:8 transmitters (1) 110:15 transmitting (1) 116:9 treasurer (2) 21:20;25:10 treasuries- (1) 95:17 Treasury (2) 34:4;47:4 treat (1) 93:23 treatment (1) 54:15 tremendous (1) 24:8 TRIAL (17) 2:7;10:7;14:9; 19:12;21:17;31:3; 74:10,12;75:2;80:19; 90:19;153:6;154:12; 158:19;182:22; 184:2;204:10 tried (9) 23:13;73:25;85:18; 129:10;173:16; 182:2;194:21;204:1,	4 trigger (2) 43:22;72:8 trip (1) 166:22 true (17) 18:12;26:14;45:8; 47:19;48:23;59:11; 65:23;69:16;74:6; 83:5;96:5;106:8; 117:24;118:1; 149:16,18;164:5 trust (11) 25:18;29:19,23; 35:19,20,22,25;36:7, 16,21;47:2 trustee (2) 29:23;35:23 trustees (2) 35:20;36:7 trusts (4) 60:23,23;61:7; 78:16 truth (11) 27:2,4;47:21,21; 48:4;96:23;133:2,2, 24;136:11;174:10 truthful (2) 133:9;144:14 try (19) 10:11;23:18;28:6; 30:18;47:10;52:22; 56:4;100:2;102:17; 123:18;128:24; 130:11;131:5; 152:11;162:1; 173:17,21;174:2; 191:11 trying (19) 14:8;16:18;30:19; 43:6;49:14;52:7; 62:16;63:4;71:3; 96:15;105:11;130:2; 132:2;135:13;136:9; 138:4;161:24; 164:12;170:14 Tuesday (3) 11:2,15;13:24 Tuesday's (1) 11:6 tune (1) 55:21 turn (17) 13:10;32:24;76:22; 86:21;94:10,10; 103:16;143:19; 145:23;148:2;172:4; 181:6,8,10,12; 185:15,19 turned (3) 32:23;37:9,10 turnover (1) 11:22	turns (5) 55:5;70:11;77:1,2; 79:3 Tweed (4) 17:12,21;83:15; 200:17 twenty (5) 116:1;123:7; 158:25;159:16; 162:14 twenty-five (1) 162:14 twenty-seven (1) 61:7 twists (1) 55:5 two (41) 22:11,19;29:9,9; 32:14;52:17;54:7; 60:11;61:8;64:10; 65:12;78:23;100:20, 23;103:13;111:3; 116:1;118:5,8; 119:15;122:14,14; 124:8;125:16,18; 132:1;156:15; 157:18;162:2; 165:22,25;166:10,17; 167:14;175:14; 178:21;185:23; 195:6;202:9;204:15, 15 two-thirds (1) 172:5 two-way (1) 112:11 type (13) 21:9;82:23;90:2; 104:21;130:16; 137:24;140:22; 141:21;159:17; 161:18;163:11; 184:22;196:10 types (4) 44:25;161:23; 191:10,12 typically (3) 83:10;105:10; 122:8 U UBS (7) 83:21;86:5,22; 88:22,23,23;202:23 ultimate (4) 22:18,24;105:20; 164:10 ultimately (20) 27:17,22;29:24; 67:23;69:5;76:4; 79:13;80:11,23; 86:24;87:11;93:1;	94:15;103:12; 107:14;113:22; 131:22;163:19,23; 168:17 unauthorized (1) 99:10 unbelievable (1) 36:11 uncertain (3) 42:14;66:7;76:21 uncertainty (2) 103:12;194:24 under (16) 12:22;19:10;21:11, 12:22,1;27:12;45:14; 88:15;93:17;102:21; 172:21;173:3,7; 185:12;186:6;192:7 underlying (2) 81:10;189:4 understood (3) 130:25;193:13; 201:3 undertake (1) 184:7 undisputed (4) 21:16;29:6;37:12, 14 Unfortunately (2) 20:15;200:25 unhappy (1) 66:15 UNIDENTIFIED (2) 132:11;155:25 unimpaired (2) 54:22;65:17 unimpairment (1) 54:21 UNISON (1) 205:4 unit (2) 35:7;113:23 unitary (4) 40:10;42:2,4;43:9 units (1) 111:24 University (1) 111:18 unless (5) 53:12;55:25;95:16; 198:8;202:2 unlock (1) 12:25 unpredictable (1) 54:25 unrelated (1) 49:8 unresolving (1) 204:6 unsolicited (1) 40:21 unsuccessful (2) 74:1;85:18
---	---	--	---	--

unusual (1) 54:12	192:5	violates (1) 82:10	watching (1) 73:3	4:9;13:18;15:9,15; 18:25
up (58) 21:5,14;22:11,19; 23:22;28:21;33:4,9; 24:38;9;40:20;45:24; 48:5,13,22;50:14; 51:14,24;53:1;57:16; 61:25;65:21;66:19; 70:6,24;84:7;85:12; 86:3,13,13,19;91:11; 93:10;102:3;103:23; 107:1;115:17;116:5; 134:8,10;135:10; 138:24;139:3; 141:20;161:25; 162:10;164:12; 165:8;166:22; 169:12;180:18; 181:6;192:10;195:4; 203:23;204:5;205:5, 5	useful (1) 202:11	violation (1) 89:17	Watkins (4) 83:14,22;86:5,22	whole (14) 40:4,10;41:19; 46:6,17;48:6;66:9; 67:14;78:9;102:12; 164:16;170:3;185:8; 193:22
updates (1) 127:24	uses (2) 119:4;122:14	virtually (1) 30:7	way (40) 23:19;32:7;41:6; 43:7;45:12,13;46:2, 3;49:19;52:20;53:2, 19;56:2;68:13;69:18; 79:9;84:7;94:19; 95:8;101:17;102:11; 106:4;116:3;122:25; 123:3,6;125:18; 132:12;138:2; 146:18;167:2,20; 181:3,4;184:13; 191:18;194:11; 198:17;199:16; 201:18	67:14;78:9;102:12; 164:16;170:3;185:8; 193:22
upfront (1) 72:3	using (5) 25:21;43:19;65:8; 97:15;171:4	virtue (1) 90:15	who's (3) 78:14;89:4;164:8	
uplink (14) 68:8;116:4,4; 122:4,7,11;123:7,9; 125:5,7,9,14,15,23	Usually (2) 179:12;193:10	visible (1) 110:15	whose (1) 78:13	
uplink-only (1) 126:1	V	voice (2) 39:16;169:12	wide (1) 14:21	
upon (7) 26:9;87:16;186:3, 11;190:1,1;197:20	valid (1) 75:20	Voight (3) 51:8,17,23	wife (6) 29:22;35:20,23; 36:7;77:3;78:16	
upside (1) 195:20	valuable (1) 20:24	VOIR (1) 157:7	William (1) 157:2	
urge (1) 10:11	valuation (2) 158:18;159:5	volume (1) 154:25	willing (8) 103:22;149:3; 152:10;163:9; 192:12;196:3,6; 202:17	
urging (2) 97:24;98:10	value (7) 13:1;24:8;54:18; 192:7,18;195:22; 196:9	volumes (1) 26:14	willingness (2) 190:3,6	
USA (1) 5:21	variation (1) 22:12	volunteers (1) 10:9	WILLKIE (4) 6:12;53:18;139:18; 200:21	
usable (4) 123:4,16,20; 125:19	various (4) 12:22;130:7;153:7; 199:10	vote (3) 64:16;70:16;174:8	Wilson (1) 15:14	
USAirways (1) 166:7	vast (5) 31:10;34:13; 152:14,16,18	voted (1) 170:19	WiMAX (2) 113:18,20	
use (22) 10:6;39:15;67:25; 92:12;117:18; 118:14,19,20;119:5; 122:6,10,11;123:25; 124:9,15;125:2,14; 139:9;141:15; 144:18,19;192:23	vehicle (2) 61:19;70:6	votes (1) 54:22	WiMAX-based (1) 113:18	
used (17) 23:3;25:8,10,14,16, 22;30:4,12;74:14; 78:14;82:14,15;91:3, 4;94:23;118:22;	vehicles (2) 22:12,20	voting (5) 25:12;54:13;85:11; 170:20;172:3	win (2) 82:21;174:13	
	veil (1) 56:14	W	window (1) 30:1	
	verify (3) 129:11;130:2,2	wagons (1) 182:3	wink (1) 27:7	
	Verizon (4) 111:25;140:19; 182:20;194:2	wait (4) 56:8,9;101:2,4	winner (1) 173:22	
	versus (2) 172:9;187:24	waited (1) 69:3	winning (2) 163:7,14	
	via (1) 97:22	waiting (4) 67:11;72:22,22,22	wins (1) 82:20	
	vice (3) 113:4,7,11	waiver (5) 53:5,6;101:22; 120:12,19	WINTERS (1) 4:15	
	vice- (1) 25:9	walk (1) 157:23	Wire (2) 15:12;113:13	
	vice-president (1) 21:21	Wall (6) 8:13;179:20; 197:13,17,17,22	wireless (17) 112:2,25;113:1,1,8, 13;114:17,23;115:5; 125:4;137:16; 140:11;141:6,25; 142:8;144:3,17	
	view (15) 15:24;28:17;45:19; 46:1,3;68:12;83:5; 84:18;106:24;144:7; 148:16;180:10; 183:24;192:10;199:7	WANDER (4) 9:12;15:14;160:15; 188:8	wish (1) 205:7	
	viewed (3) 98:2;147:13; 148:23	wants (7) 10:21;85:23;86:22; 99:18,20;151:22; 165:6	withdraw (1) 150:14	
	violate (2) 44:9,9	war (1) 102:15	withdrew (5) 30:15;175:25;	
		waste (1) 134:9		
		watch (2) 56:11;64:3		

176:3,6,7 within (8) 35:6;50:1;93:12; 98:16;111:24; 114:15;160:14,23 without (16) 18:15;29:3;41:15; 44:25;55:1;75:24; 84:23;88:22;90:5; 91:15;95:21;102:22; 117:8;118:18; 161:25;193:3 witness (34) 46:9;49:3;80:24; 108:24;109:3,10; 124:19;126:4; 135:14,17;136:1; 139:14,16;142:21; 146:18;155:19; 156:9,13;157:5; 158:19;167:2,18,21, 25;169:13;188:10; 191:25;192:5,14; 193:17;200:3,20,23; 204:12 witnesses (5) 17:15;18:17;80:20; 99:21;156:15 wives (1) 35:5 woes (1) 72:24 wondered (1) 59:2 word (8) 52:11;54:14;82:14, 15;85:4;86:14; 104:11;185:5 words (31) 13:7;32:14;38:1; 58:8;74:14;80:22; 81:8,11;82:13,18; 83:1,12,13;84:10,10, 12,24;85:25,25; 87:10,11,14,16;97:9, 22;105:19;107:8,17, 18,23;193:15 work (13) 21:6,7,7;44:11; 57:1;61:15;62:1; 87:23;94:6;114:15; 130:14,15;138:9 worked (3) 27:10;83:16;94:4 working (6) 48:12,17,18;98:23; 114:13,13 works (8) 49:22;60:13,13,14, 14;61:12;94:5; 204:18 world (5) 68:12;76:24;	102:13;192:17; 193:18 worried (4) 56:7;63:9;71:18,19 worry (1) 59:4 worse (2) 81:22;201:2 worth (7) 37:20,22;77:2; 79:4;165:5;192:8; 193:7 worthy (1) 37:14 write (1) 38:10 writes (24) 38:11;40:3;50:13, 14,15,16,17,18,19,21, 23,25;51:9,11,12,16, 17;52:2,2,3,11;182:2; 183:3;187:12 writing (3) 70:23;153:7; 193:10 written (4) 11:3;91:17;95:9; 197:20 wrong (4) 45:9;70:15;83:17; 99:12 wrote (5) 38:15;50:4;62:12; 93:25;148:20 X XYZ (2) 163:25;174:12 Y year (15) 49:12;55:4;56:8; 57:4;63:12;66:21; 68:11;71:2;73:4; 101:18;116:18; 129:13;158:6; 175:23;182:5 years (15) 29:9;55:6;61:7; 68:18;112:5,19; 151:19;152:2; 157:12;158:3,9,11; 166:2,4;194:7 yelled (1) 201:20 yep (1) 186:17 yesterday (2) 11:3;35:16 yield (2) 11:19;13:1	York (16) 2:23;4:4,12,23;5:5, 15;6:5,15;7:5,21; 8:15;9:4;83:11;84:9; 88:15;93:18 Young (1) 15:11 Yup (1) 187:9 Z Zatz (1) 15:15 Zelin (4) 103:2,6,16;104:2 Zelin's (1) 104:9 Zell (1) 19:1 Zero (3) 85:8;87:9;104:3 zone (2) 122:8,12 1 1 (5) 142:18;143:1,16; 150:10;185:16 1.5 (1) 124:6 1:44 (1) 108:17 10 (4) 91:11;95:11;205:8, 9 10.04 (1) 88:2 10.04B (1) 88:9 100 (1) 165:5 10004 (1) 7:21 10005 (1) 8:15 10017 (1) 4:23 10019 (2) 6:5,15 10022 (1) 5:15 10036 (3) 4:4,12;5:5 10038 (1) 7:5 10040 (1) 2:23 10075 (1) 9:4 101 (1) 86:9	104 (1) 104:2 10th (1) 187:13 11 (18) 20:8;24:23;26:4; 27:20;28:1,12,13; 29:17;30:13;40:9; 54:2,25;66:8;127:17; 170:12,13,16;202:23 11:59 (1) 13:25 1129b (2) 54:14,17 11530 (1) 5:23 1155 (1) 4:11 11743 (1) 8:6 11th (2) 50:12,20 12:25 (1) 99:17 12:30 (4) 18:7,10;91:10; 99:21 12:36 (1) 108:17 125 (9) 7:20;76:13;91:14; 95:2,8,19,24;165:7,8 12th (1) 8:14 13 (2) 40:19;93:11 13-01390-scc (1) 2:4 14 (1) 189:3 14th (2) 187:5,25 15 (1) 102:3 161 (3) 126:5;127:9,15 1633 (1) 6:4 17 (1) 103:16 18 (3) 86:4;94:13;146:2 180 (1) 7:4 18th (2) 148:9,20 19 (1) 86:15 192nd (1) 2:22 1983 (1) 88:14 1990 (1)	111:17 1991 (1) 161:23 1993 (1) 112:6 1995 (1) 121:25 1998 (1) 158:8 2 2 (1) 187:4 2.2 (1) 93:3 2:55 (1) 156:22 2000 (5) 116:2,2;121:25; 123:3,13 2001 (1) 111:19 2004 (1) 55:13 2005 (2) 123:3,13 2006 (4) 116:21;117:7; 153:6,9 2008 (2) 117:13;158:10 2008-2009 (1) 118:9 2009 (3) 114:3,6,7 2010 (12) 86:4,15;109:23,25; 114:11;118:10,11,25; 119:1,12;120:19; 150:10 2011 (11) 21:18;24:11;32:3, 7;64:1,4;68:17; 119:14,15;120:8,8 2012 (34) 32:18;33:6;47:13; 49:13,14,25;50:10, 12;51:8;52:24;64:5; 68:19;87:19,23; 110:21;111:7;121:1, 5,8,11;123:12; 127:17;128:6; 153:10,11,13,16; 154:6,15;182:1,6,13; 185:4,25 2013 (50) 25:25;40:18,19; 41:2;49:10;50:10; 51:20;52:24;67:24; 68:19,20;69:2;77:17; 92:4;96:20;98:20; 123:23;125:1;
---	---	---	---	--

129:13,15;130:4; 140:5;142:18;143:2, 16;145:7,16,20; 146:2;148:9,21; 149:19,21;153:1; 168:15;173:12; 176:18;177:24; 178:4,10;179:21; 186:14,16,17,22; 187:5,19;188:1; 189:3;197:24 2019 (1) 54:7 2020 (1) 116:3 2039 (1) 7:12 2180 (1) 116:6 21st (3) 12:6;52:9,10 22 (1) 41:2 2200 (1) 116:7 22nd (1) 66:21 23 (1) 8:4 24th (3) 50:25;51:2,2 25 (1) 165:6 28th (1) 40:17	205:10 400 (1) 5:22 425 (1) 4:22 44 (1) 8:13 443 (3) 145:24;146:1; 155:2 4G (1) 113:17 4th (1) 32:18	182:21,22 9.03 (1) 89:1 90067 (1) 7:13 930 (1) 9:3 935 (1) 143:20 973406-2250 (1) 2:24		
3	5			
3 (3) 143:19;146:25; 185:20 3:07 (1) 156:22 302 (1) 8:5 340 (1) 148:3 36 (4) 153:6;154:13; 181:11;182:22 363 (5) 65:18;170:9,19,20, 21 39 (1) 184:2 399 (1) 5:14	5 (7) 86:13;182:1,23; 184:6;202:3,5,10 500 (2) 142:4;149:7			
4	6			
4 (2) 86:3;186:24 4:15 (1)	6 (2) 86:21;202:11 679 (2) 142:23;143:17			
	7			
	7 (1) 87:10 7:48 (1) 184:6 700 (7) 2:22;29:3,19; 35:18;42:13;123:25; 124:13 787 (1) 6:14			
	8			
	8 (5) 88:10;181:12; 184:3,4;185:6 8:34 (1) 187:5 800 (2) 34:10;42:13 803.3 (1) 135:23 80s (1) 158:1 8th (4) 51:20;145:16,19, 20			
	9			
	9 (2)			